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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1968

**RECORD NOT  
PRINTED**

No. **12**

**SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC,  
JEAN NEBBIA and ANTHONY SUTERA,**

*Petitioners,*

—against—

**UNITED STATES OF AMERICA,**

*Respondent.*

**JOINT PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC,  
JEAN NEBBIA and ANTHONY SUTERA,

*Petitioners,*

—against—

UNITED STATES OF AMERICA,

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**JOINT PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

The above named petitioners\* jointly pray that a writ

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\* Under date of December 8, 1967 petitioner LeFranc wrote to the Clerk of this Court stating in part, "I respectfully ask the Clerk to include me in the petition for certiorari by the other defendants. I expected an attorney in Atlanta to file this for me and I received a letter returning my papers. I now find that I must personally request the Court's help". LeFranc was represented in the Court below by undersigned counsel Messrs Markowitz and Glasser, but he

*(Continued on following page)*

of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit, entered in this case on October 13, 1967.

### Opinions Below

The opinion of the Court of Appeals affirming the convictions of the petitioners, and the opinion of the District Court after remand on issues of electronic eavesdropping, are not yet reported; they are printed, respectively, in Appendices A and B hereto, *infra*.

### Jurisdiction

The judgments of the Court of Appeals were entered on October 13, 1967 (Appendix C hereto, *infra*). The time for filing petitions for certiorari has been extended to and including December 12, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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(Continued from preceding page)

has not retained any of the undersigned counsel for this certiorari; some weeks ago he advised us that he had counsel in Atlanta, Georgia, for this purpose. He has also repeatedly told us, most recently on December 8, 1967, not to include him in this petition and that he would himself write to the Court requesting to be included. Some weeks ago LeFranc applied *pro se* for extension of time to petition for certiorari and Mr. Justice Harlan granted him until December 15, 1967. Owing to LeFranc's error in stating the date of the judgment to be reviewed, the December 15 extension date put LeFranc three days beyond the jurisdictionally permitted extension period. We (counsel) then *Sua Sponte* included LeFranc in the application for extension of time filed on behalf of the other petitioners, and all petitioners were then granted an extension to December 12, 1967. In connection with the last mentioned application, entry of appearance was filed, as required by the new Rules, by Mr. Glasser (counsel herein) for all petitioners including LeFranc. In view of that entry of appearance, *i.e.*, to insure that no duty of counsel is breached, we have included LeFranc's name as one of the petitioners in this joint printed petition, subject of course to any direction by the Court.

## Questions Presented

Petitioners were convicted of narcotics conspiracy, this being the much-publicized "deep freeze" narcotics case in which two American Army officers allegedly shipped from France a deep freeze unit containing the largest amount of pure heroin ever captured by police in this country. In this narcotics case of unprecedented importance to the prosecutive and investigative personages involved, the questions presented include both the constitutionality of the Government's electronic surveillance and whether the petitioners have been accorded due process procedures (in both of the Courts below) to test out whether the Narcotics Agents have fully and truthfully disclosed their electronic eavesdropping activities relating to this case. Prior to trial the Government revealed that it intended to introduce evidence obtained by non-trespassory electronic bugging at the Waldorf-Astoria hotel in December 1965 and it represented that there had been no other electronic eavesdropping or wiretapping in this case. At a pre-trial hearing the Government's claim that the Waldorf-Astoria "bugging" was non-trespassory was sustained, the evidence was received at the trial, and the Government told the Jury in summation that "it was through these [bugged] conversations" that the Government had decisively built its case. The questions are:

1. Accepting *arguendo* the Government's contentions (and the findings below) as to the manner in which the Waldorf-Astoria bugging was done, was the resultant evidence constitutionally admissible under the *Pardo-Bollard* case (*infra*) on the theory that although the Government secretly "bugged" and recorded private conversation in a private hotel room, the method used involved no "trespass" or forbidden intrusion into a constitutionally protected area because the microphone allegedly used was

allegedly placed at the bottom of a door in the Agents' own room adjoining the room which was being "bugged"? That is, assuming *arguendo* that the facts as to the method of the Waldorf-Astoria allegedly "non-trespassory" eavesdropping in this case are indistinguishable from those in *United States v. Pardo-Bolland*, 348 F. 2d 316 (C. A. 2 1965), cert. denied 382 U. S. 944, 946, should *certiorari* nevertheless be granted here to examine anew the principles enunciated by the Court of Appeals in *Pardo-Bolland* especially in the light of (a) the recent unqualified pronouncement in *Berger v. New York*, 385 U. S. 967 that "use of electronic devices to capture [conversation is] a 'search' within the meaning of the [Fourth] Amendment \* \* \*"; (b) the recent apparent extension of Fourth Amendment tests to electronic search activity of even the "minifon" type in *Osborn v. United States*, 385 U. S. 323; (c) the granting of *certiorari* in *Katz v. United States*, argued *sub* No. 35, October Term 1967;\* (d) the developments in the *Black*, *Schipani*, *O'Brien-Parisi*, *Granello-Levine* and *Hoffa* cases (all cited and discussed *infra*) which indicate further possibility of a plenary Fourth Amendment approach to electronic surveillance; and (e) President Johnson's sweeping directive of June 30, 1965 to the entire Federal Executive establishment (antedating by nearly six months the Waldorf-Astoria eavesdropping here involved) which apparently rendered *ultra vires* any Federal electronic surveillance unless previously cleared with the Attorney General as to legality and as to decent regard for private rights and then only where the national security is at stake?

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\* This petition is being printed in time for filing not later than December 12, 1967; down to Friday, December 9, 1967, this Court had not yet decided the *Katz* case.

2. Assuming *arguendo* that *Pardo-Bolland* is good law on its facts and need not be re-examined, is not the instant Waldorf-Astoria "bugging" factually distinguishable from that in *Pardo-Bolland*, even accepting the Government's own description of how the Waldorf-Astoria "bugging" was done, (a) in that our case involved a double-door arrangement between adjoining hotel rooms whereas *Pardo-Bolland* involved a single-door barrier, so that in our case there was actually a "trespassory" intrusion into the specially-provided (for added privacy) air space between the two doors, by reason of the admitted physical entry into that privacy-purposed air space by several of the Government's agents in preparing for the installation of the microphone; (b) also in that the "bug", as a matter of incontestible technological fact, operated as a "parabolic mike" trespassorily operating upon, through and beyond the aforesaid air space; (c) also in that in our case the issue is expressly presented that the "bug" admittedly utilized the hotel electric current as its power source so that the common wiring system of the hotel, serving all the hotel's guests, was turned into a means for electronic spying; and (d) in that in our case the issue is expressly presented that the hotel management secretly connived with the Government to plant the Agents in the adjoining room desired by them for the electronic spying, thus betraying the trust of a hotel guest who relied on his host not to betray his privacy?

3. Under the appellate supervisory responsibility to cleanse Federal criminal justice of unconstitutional taint—a responsibility currently focused on official electronic spying—should not the Court of Appeals have done much more than it did to assist the petitioners in probing into the full facts of the electronic spying in this case? Petitioners having striven in the Court of Appeals over a period of several months (*via* a massive and numerous



series of motions etc. based on elaborately specific factual showings) to demonstrate that the Government was holding back relevant information about its electronic spying activities, and the Government having at last reluctantly disgorged that two previously undisclosed trespassory buggings (in addition to the Waldorf-Astoria bug) had been perpetrated, should not the Court of Appeals have ordered a plenary remand for a hearing on all electronic spying in the case? Was it constitutional, fair or rational to grant a remand for a new electronic eavesdrop hearing without including the Waldorf-Astoria bugging, in the face of the revelations at last that the Government had so poor an appreciation of its own constitutional responsibilities of voluntary disclosure in this case, and above all in the face of our highly circumstantial demonstration in the Court of Appeals that the Narcotics Agents who testified at the original pre-trial hearing concerning the technical method of the Waldorf-Astoria "bug" must almost surely have been testifying falsely, and that it was demonstrably a virtual technological certainty (*on the present record*) that the "bug" must have been of an outright trespassory character rather than of the "*Pardo-Bolland*" type?

4. Did both of the Courts below err in ruling that the Waldorf-Astoria eavesdrop evidence was constitutionally admissible?

5. ~~Aside from the Waldorf-Astoria phase~~, were petitioners denied due process by the conduct of the Government and the rulings of both Courts below in regard to other electronic eavesdropping, the Government having belatedly admitted (at the appeal stage) two other trespassory buggings (which it claimed did not materially affect the convictions), the Court of Appeals having then remanded the case for a "full hearing" as to "these and

other electronic eavesdrops of any kind which related to this case (except for the Waldorf monitoring \* \* \*)", the Government then having made what we contend was a grossly insufficient explanation and disclosure in the ensuing remand hearing, petitioners despite these handicaps having then gone on to adduce sworn direct testimony in the remand hearing that Narcotics Agents had boasted of a successful trespassory automobile bugging in Georgia which helped to break this case, the District Court in the remand hearing then having rejected this evidence of ours on grounds of credibility and on the basis of such rejection having relieved the Government of any further burden of explanation or of going forward (even though no Agent or anyone else took the stand to deny our proof that Agents had boasted as aforesaid), and both of the Courts below having concluded that the remand proceeding was procedurally adequate and had produced no showing "that any of the evidence used against [petitioners] at the trial was tainted by any invasion of their constitutional rights"?

6. Should not the Waldorf-Astoria eavesdrop proofs have been excluded from evidence in any event because of the very poor probative quality of the tape recordings, which were in the French language, pervasively garbled and gapped, unsatisfactorily proved as to voice identification, and not satisfactorily translated for the jury by a fair due process translation procedure?

7. In the event of the granting of *certiorari*, the above Question No. 6 and the following additional questions (not argued in this petition) are respectfully preserved

- (a) Was the evidence sufficient for submission to the jury or for conviction?
- (b) As to petitioners Dioguardi and Sutera, was the evidence sufficient to prove knowledge of illegal importation of narcotics?

- (c) As to petitioner Nebbia (and, by prejudicial overflow, as to the other petitioners) was there a denial of due process, right of confrontation, right to be present at one's own trial for crime, and effective assistance of counsel, by the refusal of the trial Court to provide Nebbia with an impartial, Court-appointed French interpreter qualified to render simultaneous translation for Nebbia's understanding of the proceedings, it being undisputed that Nebbia cannot understand or speak English?
- (d) Was the Government's seizure of the narcotics in Georgia done by unconstitutional search and seizure?
- (e) Were petitioners denied a fair trial by the trial Court's handling of a request from the jury to have read to them the testimony as to what the Narcotics Agents overheard in alleged conversations between petitioners Dioguardi, LeFranc and Sutura at the Adano Restaurant in New York City, the trial Court having allowed to be read to the jury only the direct testimony of the Agents themselves and not their cross-examination testimony, which latter we contend had destructively impeached their direct testimony of having been able to overhear what they said they overheard as a matter of the sheer physical possibilities of the scene?
- (f) Were petitioners denied a fair trial by an impartial jury in view of the fact that after commencement of the trial in New York City an article appeared in a newspaper of that City referring to petitioner Dioguardi as follows "Frank Dioguardi [sic] 42, identified by the Government as

an underworld figure here", and the trial Judge having refused to hold a hearing on whether the Government had in fact "leaked" the information?

### **Constitutional Provisions and Statutes Involved**

The case involves the Fourth (search and seizure), Fifth (due process and self incrimination), Sixth (impartial jury, confrontation, presence at trial, assistance of counsel) and Ninth (reserved right of privacy) Amendments of the United States Constitution. It also involves 21 U.S.C. §§ 173, 174 (narcotics violation), and F.R.Cr.P. Rule 28 (b) (Court appointed interpreters); these statutory provisions are quoted in Appendix D hereto *infra*.

### **Statement of the Case**

#### **1. Introductory**

Petitioners were tried together on a charge of narcotics importation conspiracy (21 U.S.C. §§ 173, 174), and they were all convicted (S.D.N.Y., Palmieri, D.J. and a jury). They were sentenced as follows: Desist, 18 years; Dioguardi, 15 years; LeFrane, 20 years and a committed fine of \$5,000; Nebbia, 20 years and a committed fine of \$5,000; Sutera, 10 years. The United States Court of Appeals for the Second Circuit has affirmed all of the convictions; this petition seeks review of the judgment of the Court of Appeals.

Since the only points argued in this petition relate to electronic eavesdropping—other issues being preserved in the event of the granting of *certiorari* (Question No. 7, *supra*)—we shall only briefly summarize the trial proofs as a whole:

The Government's theory of the case was that petitioner Desist, a United States Army Major stationed in France,

and Herman Conder, a United States Army Warrant Officer in France,\* in October 1965 shipped to the United States a deep freeze unit in which was concealed a large quantity of pure heroin; that Desist came to the United States in December, 1965 to contact Conder who had meanwhile moved back to this country, and to get possession of the heroin in collaboration with petitioners Nebbia and LeFranc; that Nebbia and LeFranc also came to the United States around that same time; that in Nebbia's hotel room at the Waldorf-Astoria Hotel in New York City he held conversations (separately) with Desist and LeFranc which revealed alleged important details of the alleged conspiracy as overheard and recorded on an electronic apparatus which the Government claimed involved no "trespass" because the apparatus was claimedly located entirely within the bounds of a hotel room engaged by Narcotics Agents, immediately adjoining Nebbia's hotel room; that after the "bugged" Waldorf-Astoria conversation between Nebbia and LeFranc, the latter was followed by Narcotics Agents who saw him meet with petitioners Dioguardi and Sutera, and thereafter the Agents overheard LeFranc, Dioguardi and Sutera conversing at a small bar in a New York City restaurant (Adano's), the conversation allegedly being relevant to the within conspiracy charges and indicating (according to the Government) that Dioguardi and Sutera were negotiating with LeFranc for purchase of the heroin which was somewhere in Georgia or the Georgia region; that thereafter Nebbia and LeFranc flew to Columbus, Georgia where they met Desist; that Desist was staying at the Black Angus motel in Columbus, Georgia; that Nebbia and LeFranc rented a car in Columbus and later another car in Atlanta in

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\* Conder was indicted in this case, but was severed for trial and he testified for the Government.



which they made various perigrations denoting furtive purpose and activity; that Nebbia and LeFranc visited Desist's room at the Black Angus motel; that Desist met with Conder at the Black Angus hotel restaurant; that the Agents tracked down Conder and placed his home under surveillance; that Nebbia and LeFranc, evidently suspicious that they were being watched, returned to New York, and Desist did likewise, without taking possession of the heroin; that Nebbia and LeFranc had been followed by Government vehicles as they traveled around the Atlanta-Columbus region; and that on the day after Nebbia, LeFranc and Desist left the Georgia region the Agents, under a search warrant, seized the heroin from Conder, and then placed him under arrest.

The Government's proofs at the trial consisted of testimony by Conder; testimony by Narcotics Agents as to the New York City eavesdropping, the Adano restaurant conversation, and the movements of the various defendants in New York and Georgia; testimony by airline employees, car rental company employees and the like; and the introduction into evidence of the seized heroin.

We take it that there neither is nor can be any dispute that the prosecution and conviction of the petitioners is ineradicably bound up with the results and proofs of the Waldorf-Astoria eavesdropping.

There was no proof by the Government at the trial, and no other indication until the appeal (*infra*), that the Government had also trespassorily "bugged" one of the rental automobiles used by Nebbia and LeFranc in Georgia.

**2. Description of the record items needed for evaluation of the electronic eavesdrop issues.**

In view of the recent changes in this Court's Rules as to filing of the record on petition for certiorari and the elimination of the former appendix practice, a case like the present one presents to a petitioner for certiorari a number of "logistical" difficulties. The only issues which we feel we can adequately present in this petition (considering space limitations) are the electronic eavesdrop issues, but even so limited the record materials to which we should like to invite the Court's attention are voluminous, and we should have wanted very much the right of filing with this joint petition a conveniently compiled special appendix embodying what we deem to be the really indispensable record items without which, we fear, the persuasiveness of our electronic eavesdrop contentions may not emerge.

As the Court will have gathered from our Questions Presented (and from the two opinions below which are printed as appendices A and B hereto, *infra*), the present record contains voluminous documentation pertaining to the electronic eavesdrop issues. Both in quantity and in importance the great bulk of that documentation entered the record for the first time during the appeal stage, whose initial phases coincided generally with the then newly spurred interest of this Court and of the Department of Justice concerning electronic eavesdropping that was initiated by the *Black-Schipani* developments during the second half of the year 1966. The numerous and detailed turns and evolutions which the electronic eavesdrop issues in this case have gone through during the appeal stage alone are hopelessly beyond the scope of a petition for certiorari except in a most briefly summarized form which perforce loses much of the flavor or atmosphere needed

to convey to a newcomer to the situation that convincing sense of injustice derivable from the record when read in detail. The problem for the certiorari petitioners in the present instance is not eased, of course, by the fact that two lower Courts have rejected the petitioners' electronic eavesdrop contentions. We hope to show in this petition that, notwithstanding the fact that the two opinions below read powerfully indeed (on the electronic eavesdrop issues), their power is only on the surface. We pray that this Court may find it appropriate to dig deeper. Shortly after the filing of this petition we shall make a motion in this Court for permission to file nine copies of a special appendix or compilation of the pertinent record items on the electronic eavesdrop issues. Meanwhile, we have requested the Clerk of the Court of Appeals to be sure to include in the record for filing in this Court *all* of the appellate proceedings relating to the eavesdrop issues, including briefs and other written presentations and communications (*i.e.*, not limited to formal "motions" as such of the parties), some of the principal documentary presentations in the Court of Appeals having been in a form other than that of "motions" as such.

For petitioners, the items deemed essential in this record for a proper understanding of the electronic eavesdrop issues, are as follows:

- I. The original pre-trial motion for suppression of evidence obtained by electronic eavesdropping (R. 2873-2876).
- II. Transcripts of pre-trial proceedings on electronic eavesdrop motions dated April 27, May 4, June 7, June 8, 1966 in which the Government revealed the Waldorf-Astoria bugging and represented that there was no other electronic surveillance or telephone wire tapping (cited

*infra* by date and by separate page numbers for each date).

- III. The trial minutes pertaining to introduction of the Waldorf-Astoria eavesdropping evidence (pertinent pages cited at appropriate pages *infra*).
- IV. Printed brief for appellant Nebbia in the Court of Appeals.
- V. Printed brief for appellants Dioguardi and Suter in the Court of Appeals; printed brief for appellant LeFranc in the Court of Appeals.
- VI. Typewritten "Motion for Permission for Electronic Consultant to Listen to and to Inspect Tape Recordings" filed by appellants in the Court of Appeals, January 4, 1967 (supplementing the aforementioned printed briefs as to appellants' requests for "Schipani" review of electronic eavesdropping, and especially requesting *de novo* scrutiny of the Waldorf bugging).
- VII. Typewritten "Motion for Supervisory Orders *Re* Electronic Eavesdropping Issues, etc.", filed by appellants in the Court of Appeals on or about January 11, 1967 (supplementing item VI, *supra*).
- VIII. Typewritten "Affidavit in Opposition" by Assistant United States Attorney Otto G. Obermaier, filed in the Court of Appeals, sworn to January 5, 1967.
- IX. Typewritten "Affidavit in Opposition" by Mr. Obermaier, filed in the Court of Appeals, sworn to January 19, 1967.

- X. Printed "Brief for the United States of America", the Government's main brief on the merits in the Court of Appeals, filed January 17, 1967.
- XI. Typewritten "Supplemental Brief for Appellants", filed in the Court of Appeals January 25, 1967, after the argument of the appeal, which was held January 19, 1967 (mainly devoted to the subject of President Johnson's order of June 30, 1965, curbing electronic spying by federal officers).
- XII. Typewritten "Supplemental Memorandum for the United States of America", filed in the Court of Appeals, dated February 1, 1967, replying to item XI *supra*.
- XIII. Letter dated February 15, 1967 from United States Attorney Robert M. Morgenthau to the Court of Appeals Panel, negating the existence of any "Schipani" materials affecting this case.
- XIV. Typewritten "Motion for Permission to File Supplemental Statement for Appellants After Oral Argument", filed in the Court of Appeals on or about March 27, 1967, contending that Mr. Morgenthau's letter of February 15, 1967, *supra*, did not adequately dispose of the "Schipani" question.
- XV. Letter dated April 18, 1967 from the Clerk of the Court of Appeals to Mr. Morgenthau requesting "clarification" of the latter's letter of February 15, 1967 (*supra*), and stating in part, "What the Panel wants to know is whether [the "Schipani"] review has disclosed any trespass committed in connection with the monitoring in the above case".



- XVI. Letter dated April 27, 1967 from Mr. Morgenthau to the Clerk of the Court of Appeals stating (conclusorily) that "there was no trespass committed" in the Waldorf-Astoria bugging, and disclosing for the first time that two other trespassory buggings had occurred but had not materially affected this case.
- XVII. Letter (consisting of thirty pages) dated May 1, 1967 from Abraham Glasser (of counsel for all appellants) to the Clerk of the Court of Appeals urging a full "Schipani" hearing in view of all of the foregoing.
- XVIII. Order of the Court of Appeals dated May 29, 1967 remanding the case to the District Court for a hearing limited to the two instances of trespassory electronic eavesdropping first disclosed in Mr. Morgenthau's letter of April 27, 1967, *supra*.
- XIX. Typewritten "Motion for Amendment of Remand Order of May 29, 1967", filed by appellants in the Court of Appeals on or about June 12, 1967 requesting enlargement of the remand order to cover any and all electronic eavesdropping of any kind which may have related to this case, including the Waldorf-Astoria eavesdropping.
- XX. Order of the Court of Appeals dated June 14, 1967 enlarging the remand order as prayed in item XIX, *supra*, but excluding the Waldorf-Astoria phase.
- XXI. Transcript of minutes of remand hearing before District Judge Palmieri, June 7, June 14, June 19, June 26, July 6 (erroneously dated

July 7), July 11, July 18, and July 25, 1967 (hereinafter cited by separate dates and page numbers thereof), together with exhibits, especially defendants' exhibit A ("Tentative List of Witnesses for Defendants") dated July 6, 1967), and defendants' exhibit B ("Statement for Defendants Explaining the Relevancy of Testimony Sought From Witnesses listed in 'Tentative List of Witnesses' etc.") dated July 11, 1967.

- XXII. Typewritten "Brief for Defendants-Appellants After Remand Hearing *Re* Electronic Surveillance with Requests for Findings", filed in the District Court on or about August 21, 1967.
- XXIII. Government's typewritten "Pre-Hearing Memorandum of Law", "Post-Hearing Memorandum of Law" and "Proposed Findings of Fact and Conclusions of Law", filed in the District Court at the remand hearing, June-August 1967.
- XXIV. Memorandum opinion of District Judge Palmieri on remand hearing, filed August 30, 1967, printed as Appendix B hereto, *infra*.
- XXV. Typewritten "Brief for Appellants After Remand Hearing *Re* Electronic Surveillance", filed in the Court of Appeals on or about September 29, 1967.
- XXVI. Printed "Supplemental Brief and Appendix for the United States of America", filed in the Court of Appeals after remand hearing Dated October 9, 1967 (the "Appendix" contains the aforementioned defendants' exhibits A and B mentioned in XXI, *supra*).

XXVII. Opinion of the Court of Appeals affirming the convictions, dated October 13, 1967 (printed as Appendix A hereto *infra*).

In referring *infra* to the above twenty-seven Roman-numbered items, we shall cite them sometimes by a descriptive citation and sometimes also by the appropriate Roman-number given in the above listing, as may best serve convenience and clarity.

**3. The unfolding of the electronic eavesdrop issues in this case: Synopsis.**

As above suggested, adequate appreciation of the eavesdrop issues herein is difficult without detailed examination of the above listed twenty-seven items. However, the panoramic picture may be glimpsed from that listing in itself, and the following synopsis may be of further help—our principal presentation being reserved until our “Reasons for Granting the Writ” *infra* (record references for the factual recitals in the following synopsis appear in the “Reasons”, *infra*):

At the pre-trial proceedings in May-June 1966 before District Judge Palmieri (items I, II, *supra*) the defense moved to suppress electronically obtained evidence, the Government made known that it intended to use evidence from an electronic auditing of Nebbia's room at the Waldorf-Astoria in December 1965, the Government also represented that there had been no other electronic eavesdropping or telephone wiretapping, and Judge Palmieri held a hearing as to the Waldorf-Astoria bugging, which resulted in a finding of “no trespass”.

At the trial of this indictment (June 15-July 11, 1966) the Government used the Waldorf-Astoria bugging evidence, renewed defense objections as to its admissibility

and defense objections as to its probativeness being overruled. As previously noted, the prosecutor in summation touted the Waldorf-Astoria eavesdrop evidence as having been triumphantly vital in the Government's making of this case (R. 2244).

Petitioners were sentenced August 30, 1966. Their appeal was argued January 19, 1967. During that interim the now famous happenings of *Schipani v. United States*, 385 U. S. 372, occurred. The possible impingements of *Schipani* were promptly brought to the attention of the Court below in connection with this case. Commencing with appellant's (petitioners') opening briefs in the Court below (items IV-V, *supra*), we endeavored to reopen before that Court the electronic eavesdropping issues in this case. In the relative leisure of our re-study of the record for the purposes of the appeal, we had perceived meanings which had previously escaped us, in connection with the testimony of the Narcotics Agents at the pre-trial Waldorf-Astoria suppression hearing; and the advent of *Schipani* seemed to us to offer an entirely proper procedure for reopening the question of the constitutionality of the Waldorf-Astoria "bugging".

Our above Roman-numbered listing of motions etc. reflects the necessity to which we were put by the tooth-and-nail resistance of the office of the United States Attorney for the Southern District of New York in the struggle over whether the within narcotics convictions deserve to survive a thorough constitutional scrutiny as to prosecutive use of electronic spying. In this struggle there were two crucial phases, namely, (1) a reopening of the question of the constitutionality of the Waldorf-Astoria bugging, and (2) a "Schipani" review to determine whether there had been any other electronic surveillance in this case notwithstanding the Government's pre-trial representation

to Judge Palmieri that the Waldorf-Astoria bugging was the only such incident.

We were never able to persuade the Court of Appeals to reopen the Waldorf-Astoria case. That Court did order a plenary hearing as to any other electronic eavesdropping relating to this case. Such hearing was held and resulted in a finding that, although the Government had belatedly admitted to trespassory buggings—in addition, to the Waldorf-Astoria situation—no showing was made that any evidence used against petitioners at the trial was tainted by any invasion of their constitutional rights.

### Reasons for Granting the Writ

#### I. The *Pardo-Bolland* case and the Waldorf-Astoria eavesdrop.

By the Government and the Courts below it has evidently been taken as an axiom throughout this case that the electronic eavesdropping in Nebbia's room at the Waldorf-Astoria Hotel was legally and constitutionally permissible under the rule of *United States v. Pardo-Bolland*, 348 F. 2d 316, 321-323 (C. A. 2 1965), cert. denied 382 U. S. 944. That is, the same or substantially same type of electronic eavesdrop installation approved in *Pardo-Bolland* is said to have been used in this case, viz., a microphone taped to the bottom of a hotel room door having a slight aperture whereby conversations were bugged in an adjoining room. We contend that the method of electronic bugging used in the present case was radically and, from the constitutional standpoint, decisively different from that in *Pardo-Bolland*. If we are wrong in that contention, we request disapproval the *Pardo-Bolland* rule (which this Court has thus far not affirmatively embraced in any event).



On the basis of the present record, without more, there is strong factual and legal ground for urging that the electronic bugging of Nebbia's hotel room was done in a manner which takes it outside the protection of the *Pardo-Bolland* case, *supra*, and brings it within the ban of the rule against the "trespassory" types of electronic eavesdropping. E.g., *Silverman v. United States*, 365 U. S. 505; *Clinton v. Virginia*, 377 U. S. 178.

The basic electronic installation which the Government states was used in this case was the attaching, by adhesive tape, of what is known as a multi-directional microphone to the bottom of the door in the agents' hotel room (Room 1602), there being a small aperture at the bottom of the door (about  $\frac{3}{8}$ " ), and the microphone being tilted at an angle of forty-five degrees, i.e., tilted back in the direction of the agents' room in such a manner as to form a cup that would act as a sound collector (see the photographic exhibits, Govt. Ex's 1, 2, 3, 4, in ev. at Tr. of June 7-8, 1966, p. 105). A wire ran from this microphone to a bathroom in the agents' room where the wire connected to what is known as a pre-amplifying device which in turn was connected to a tape recorder that also had an auditing device by which the agents could listen at the same time that the sound was being recorded on the tape.

It is important to note that the door in the agents' room to which the microphone was allegedly taped was *part, and part only*, of the separation between the two rooms. There was also, separated by a narrow space of only a very few inches from that door in the agents' room, a similar or identical door leading into Nebbia's room. In other words, the two rooms were separated by a double door with a narrow air space between them, a double door construction of the familiar type found in many hostleries



of the better class. This, in turn, means that between these two immediately adjoining doors the narrow air space which existed was *common* to each room and formed, so to say, a common *cushion* of an acoustic nature; and at the same time, and more significantly for present purposes, it formed, *when (but only when) electronically bugged from either room in the manner claimed by the Government itself, a common sound chamber.*

The particular method of multi-directional microphone electronic bugging which the Government itself asserts was used in relation to the double-door-air-space situation of the two adjoining rooms in question, amounted (on the Government's own factual representations, we repeat) to what electronic sound technicians commonly denominate as (using their various terminological synonyms) a form of *intrusive* electronic bugging employing the principle of the "tuned chamber", or "resonator tube", or "resonator chamber", or "tuned resonator", or "frequency cavity chamber" or—turning now to terminologies which may be more familiar in the contemporary lay vocabulary during the current era of heightened interest in electronic bugging—the principle of the "tubular microphone", or "pipe microphone", or "shotgun microphone" or, what is probably the contemporaneously most familiar (and frightening) term of all of these, the principle of the "parabolic mike". That is to say, when a multi-directional microphone is taped to an aperture of a narrow airspace of the type here involved (the double door setup between the agents' and Nebbia's room) in the manner here done and at the angle of tilt here used, that microphone operating in combination with the narrow intervening airspace becomes a "parabolic mike" for the purpose of electronically bugging the adjoining room space, viz., Nebbia's Room 1600 at the Waldorf-Astoria.

All of our foregoing recitals, and remarks, concerning what we have termed the "parabolic mike" character of the installation at the Waldorf-Astoria, are based, we respectfully repeat, on the Government's own description of the installation. The decisive physical feature in this picture is the *double-door with narrow intervening airspace*. The supposedly identical or dispositively similar microphone installations in the hotel or motel rooms involved in *Pardo-Bolland*, did not involve *double doors (infra)*.

The classic expression by this Court in defense of room-privacy against electronic-eavesdrop intrusion where the latter is sought to be constitutionally condoned as being technically "non-trespassory", was made in *Silverman v. United States*, 365 U. S. 505, where the electronic buggers utilized, with what proved to be a constitutionally abortive intention of "non-trespassory" finesse, a minimally intrusive device for picking up what amounted to sound-chamber products in a heating duct system of the premises there involved. In the particular kind of double-door-with-narrow-intervening-airspace that is involved in our case, the airspace or sound-chamber is the equivalent, we suggest, both under the laws of physics and under the law of the United States Constitution (Fourth and Fifth Amendments), to the sound chamber which in *Silverman* consisted of the heating duct system. The case is radically distinguishable, in fact and in law, from *Pardo-Bolland*, where only single (not double) adjoining doors were involved.

In short, the airspace between the double doors in our case had a necessary effect if not an express engineering purpose of creating an acoustical barrier or air cushion for the benefit of additional privacy for the Waldorf-Astoria's guests—so that such air space may properly be deemed to be part of the premises of Nebbia's room, and the Govern-

ment's utilization of this air space in the particular bugging installation here claimed by the Government to have been used became in literal effect a perversion of the privacy barrier, forming part of Nebbia's premises, into a means for directly invading his privacy.\*

We have examined the record and briefs in the Court of Appeals in *Pardo-Bolland*, and the certiorari papers in that case, and it does not appear that any argument or analysis along the lines here being suggested was advanced. In the petition for certiorari in *Pardo-Bolland* (p. 6), it was merely stated, conclusorily and without demonstration, that the microphone taped to the agents' side of the door between the two rooms was "an unauthorized physical penetration into the premises occupied by" *Pardo-Bolland*, within the meaning of the *Silverman* case; and it was suggested that an engineer with calipers or a micrometer might be needed to determine the depth or degree of penetration, "fractions of inches" being urged as having no significance in view

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\* We are aware that similar reasoning could be urged in a case like *Pardo-Bolland*, *supra*, where a single door was used on the agents' side, or in a case like *Goldman v. United States*, 316 U. S. 129, where a dictaphone was placed against a common wall, said installations being judicially approved (condoned might perhaps be the better word). However, we are not aware that any argument was advanced in either of the latter cases along the lines here being suggested, namely, that where an apparently expressly designed acoustical barrier for *enhancement* of privacy has been provided the deliberate perversion of such privacy barrier into an anti-privacy device presents a Fourth Amendment issue. As a matter of fact, this form of intrusion into an acoustical air space barrier actually makes for a pronouncedly more efficient electronic eavesdrop, with the type of device that the Government says it here used, than is true in cases like *Pardo-Bolland* and *Goldman* where only a single door or single wall partition is involved. See item VI in the Roman-numbered listing of record items, *supra*.

of the *Silverman* case. Our position here does not depend upon demonstrating any "physical penetration" in the conventional sense, as was futilely attempted to be shown in *Pardo-Bolland*; our position depends rather upon a specific analysis of the electronic and acoustical circumstances which we say here point to an unauthorized invasion of an integral part of Nebbia's private "close", namely, his acoustical privacy barrier provided by the double door arrangement with air-space in between.

One factual feature which is common to *Pardo-Bolland* and to our case is that in both cases the hotel management secretly cooperated with the Government agents to enable the latter to breach the privacy of the respective hotel guests' rooms. However, the record, briefs and certiorari papers in *Pardo-Bolland* do not indicate that this circumstance was raised or that it entered into the consideration or decision of the case. See our description *infra* of the pertinent record items herein which bear upon the actions of the Waldorf-Astoria Hotel management in cooperating secretly with the agents for the purpose of depriving Nebbia of the privacy of his hotel room. If the Fourth Amendment, as we take it is unquestionable, expresses a historical-social policy in favor of certain minimum civilized standards of decency in regard to attempted invasions of the constitutionally protected right of individual privacy, this sort of stealthy and conspiratorial plotting between secret police investigators and a man's trusted hotel host, surely calls for Fourth Amendment scrutiny. Cf. Mr. Chief Justice Warren's concurring opinion in *Lopez v. United States*, 373 U. S. 427, 444, where similar instances of breach of trust or confidence are referred to in disapproving terms; and cf. also the statement of the Government's counsel in the oral argument of *Hoffa v. United States*, 385 U. S. 293, that while the Government conceded "no difference under the

Fourth Amendment" as regards the question of closeness or trust in confiding one's secrets to another person, "perhaps there is a due process difference. There is a point—and [Chief Justice Warren's] concurring opinion in *Lopez* suggests—where closeness will affect due process." 35 U. S. Law Week 3136. This Court's decision in *Hoffa* specifically notes that "it is obvious that petitioner was not relying on the security of his hotel suite when he made the incriminating statements to Partin [Hoffa's supposed close friend and associate] or in Partin's presence. Partin did not enter the suite by force or by stealth. *He was not a surreptitious eavesdropper.* \* \* \* The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing. \* \* \*". (Emphasis added)

Let us now examine some of the pertinent additional record details of the Waldorf-Astoria eavesdrop.\* . .

In pretrial proceedings the prosecutor (Mr. Tendy) announced, after checking with one of the narcotic agents (Fitzgerald), that he knew of no other eavesdropping in this case except that which occurred in New York City (R. 3157-3158).

In another pretrial session Narcotics Agent Durham described the Waldorf eavesdrop equipment as consisting of "a dynamic microphone made by Shure Brothers, known as a Model MC-11-J. It has an impedance of approximately

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\* References *infra* to item VI of our listing of record items *supra*, may be of special interest to the Court because said item VI is our motion in the Court of Appeals which presented a detailed technological affidavit by Bernard B. Spindel, generally acknowledged to be the leading expert in this country on electronic eavesdropping techniques.



1700 ohms, and is matched precisely with this Concord Model No. 330 tape recorder and an amplifier that I personally had assembled here." (Tr. May 4, 1966, pp. 5-6). Durham also explained that the amplifier would act as a pre-amplifier to boost the power of the tape recorder when the eavesdropped sound signal dropped to a volume level too low to record normally on the tape recorder (*id.*, p. 6); that the Concord tape recorder operated either from its own battery pack or from room current\* (*ibid.*); and, referring to the manner in which the microphone was placed and taped at the bottom of the door, that "By using this tape thusly (indicating) it becomes somewhat a collector of sound, directing the sound into the microphone itself" (*id.*, p. 7).\*

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\* See our Questions Presented, No. 2, subd. (c), *supra*. Both Durham and Agent Kiere later testified flatly that the apparatus had been operated on the hotel current (Tr. of May 4, 1966, pp. 9-10; June 7-8, 1966, p. 108).

\* See our motion in the Court of Appeals filed January 4, 1967 (item VI in our listing of record items, *supra*), where it is shown in the affidavit of Bernard B. Spindel that the Shure Brothers microphone model MC 11 J which Agent Durham says was used is a low impedance microphone of only 1000 ohms, not the 1700 ohms stated by Agent Durham; that this fact is objectively demonstrable from standard catalogue materials; that the MC 11 J microphone would absolutely not have "matched precisely with this Concord model no. 330 tape recorder" which Durham said he used; that the pre-amplifier mentioned by Agent Durham would have been absolutely indispensable on the basis of *constant* operation to get any results at all, which in turn leads to the difficulty that the agents' testimony is that the pre-amplifier was not used constantly; that it is difficult if not impossible for the installation described by Durham to have worked, pointing to the strongest likelihood that a quite different installation was used, of a type which almost surely would have entailed a

(Footnote continued on following page.)



Agent Kiere, who had operated the Waldorf-Astoria eavesdrop machinery, said that it was necessary to regulate the volume of the pre-amplifier in the bathroom, saying, "This was rather critical because of the closeness of the microphone and occasionally there would be a feedback effect with a high piercing screech, where I would have to lower the volume" (*id.*, p. 10). Agent Durham said he had instructed Kiere to use the pre-amplifier only when necessary to improve audibility, "so that you don't overload the entire circuit" (*id.*, p. 16). Durham also said that there was a voice-actuated function in the equipment which would actuate the tape recorder at times when such might not be desired (*id.*, p. 20).\*

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(Footnote continued from preceding page.)

physical intrusion or "trespass" into Nebbia's room; that a multi-directional microphone thus placed and taped to focus upon sound received through the air space between the two doors becomes a "parabolic mike"; that despite the taping (and despite muffling by a cloth towel also mentioned by Durham—Tr. of May 4, 1966, p. 8) the type of microphone here assertedly used would inevitably also pick up sound in the agents' room. We indicate, *infra* the extremely interesting significance of this latter problem of the picking up of sound in the agents' room.

\* The items mentioned in the above paragraph give rise to additional problems which we pointed out to the Court of Appeals (item VI, *supra*, affidavit of Mr. Spindel): Was the use of the common hotel current in the nature of an invasion of a "common appurtenance" for the purpose of electronic spying on Nebbia, and is such constitutional? Could the equipment work at all when the pre-amplifier was not turned on? Did the feedback screech, which would presumably issue from the microphone, constitute an invasion of the air space between the two rooms or of the air space in Nebbia's own room such as might incur the constitutional ban against a physically intrusive factor occurring in the course of the electronic eavesdropping? Did the existence of the voice-actuated function necessarily subject the tape recorder to reception of far more sound from the Agents' own room than the tapes actually reveal, and, if so was the microphone actually in the Agents' room at all, or must it have been inside Nebbia's room?

Agent Durham also testified (pretrial hearing of June 7-8, 1966) that Agent Kiere told him that the door to which Durham later attached the microphone was a *connecting door* to the next room; Durham assumed that this door *opened into Nebbia's room* because of what Kiere had told him (Tr. June 7-8, 1966, pp. 98-99). Despite this testimony of Durham that he assumed from what Kiere had told him that the door on which he attached the microphone opened into Room 1600, he later said, "It was my understanding there were two doors"; he was then asked who informed him of this, and he replied (note the guarded resort to "best recollection"), "Again, to the best of my recollection, I believe Agent Kiere" (*id.*, 108-109). This theme was further pursued (*id.*, 109-112):

"Q. Agent Durham, this door under which you placed the microphone, did you know if there was another door similar to that on the other side opening to 1602? A. Not from personal knowledge, no, sir.

Q. Who told you that? A. I believe Agent Kiere.

Q. Did he say that he had opened the door from 1600 to examine the other door? A. He did not.

Q. Do you know if he did? A. I did not know that, no, sir.

Q. Did you see any plans to know how far apart the two doors were? A. No, sir."

"Q. Now, did you look through the air space? Did you look through that space? A. No, sir, I did not.

Q. Did you examine that space at all? A. No, sir.

Q. Did you check to see if that air space was clear to the next room? A. No, sir, I did not.

Q. Did anybody tell you whether or not that air space was clear to the next room? A. No, sir, they did not.

Q. In other words, there could have been a solid wall on the other side of that with no air space, as far as you knew, is that correct? A. Judging by the performance of the equipment I used it would be my opinion that there was not a wall.

Q. In other words, you only checked it by testing the equipment, is that correct? A. That's correct, sir.

Most interesting, in view of Durham's thus having tried to shield from discovery that any agents had opened the door on the agents' side which led to the door to Nebbia's room, is the fact that all or nearly all of the agents who testified at the hearing, except the very guarded Mr. Durham, freely admitted that they had opened the door on the agents' side of the double door arrangement. Kiere so admitted (*id.* 131). Likewise Agent Klempner, who indeed stated that the door was opened in the presence of a representative of the hotel management (*id.* 240-241). Agent Walter J. Smith said that he opened the agents' door and observed that there was no handle on the door leading directly into Nebbia's room (*id.*, 203); other agents had opened the door, including Durham, Kiere, Weinberg and Klempner (*id.* 217-219); Smith said he put his ear to the inner door (Nebbia's door) but could not hear anything (*id.*, 204-205, 209-210).

Thus, Smith's testimony contradicts that of Durham, the installation expert who swore he had not opened and had not been present at any opening of the door and had no idea as to the physical construction of the arrangement or the air space in between.

It taxes credulity that Durham, supposedly an experienced electronics surveillance agent, would make this important installation with the naive lack of knowledge of the physical facts as claimed by him at this hearing.\* The logical inference is that, if Agent Durham was evidently so bent upon concealing the technical details of what he had done, he may well have been trying to hide something which should not legally have been done. It is very difficult to avoid the conclusion that Agent Durham has not told the entire truth, and that a grave question persists as to just what in truth was the nature of the electronic installation. Cf. the intriguing testimony of former Agent Weinberg, who swore that he had seen no electronic apparatus in the agents' room at all (*id.*, 263, 265-267).\*\*

We previously referred to the absence from the tapes of certain kinds of extraneous noises which should have been audible on the tapes if the agents were telling the truth about the method of electronic installation by which the tapes were obtained. As seen, the agents' testimony was that the microphone used was of the multi-directional type, and that the installation was equipped with a voice-actuated function which would cause the equipment to go in into recording operation when a certain minimum volume of sound occurred. In other words, this was a microphone which would just as (or more) sensitively pick up sounds in the agents' own room (where indeed the sources of sound

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\* See the Spindel affidavit (p. 8) in our record item VI, *supra*, stating: "As an expert in this field \* \* \* it is incredible to me that any other qualified expert in the field would go about making an installation of this type on the basis of the lack of knowledge of the physical set up as stated by Agent Durham.

\*\* Might this be because the equipment was *elsewhere*; and because its linkage was with a "trespassory" installation inside or penetrating Nebbia's room?

were nearer and more open to the microphone) as in Nebbia's room; and with the voice actuated function being installed in this apparatus, there should have been heard on the tapes a substantial amount of sound coming from the agents' own room; indeed, there should have been numerous really prominent passages of sound coming from the agents' room, because there was quite a bit of sound-producing activity going on in that room, including extensive use of a typewriter by Kiere (R. 685, 855-860), a very actively used portable shortwave radio for constant communication with surveillance agents (R. 970-976—the "whole room could hear it" (R. 976)), the ringing and dialing of telephones and voices speaking on the telephone (R. 495-595), the playing of already recorded tapes (R. 693, 702-704) and, presumably, the various conversations among the agents in the room. Yet, by some apparently inexplicable magic this sensitive multi-directional microphone seems to have missed picking up any perceptible amount of all of the above enumerated categories of notable intra-room noise in the agents' own room. Nor can the explanation lie in the fact that one of the tapes had been processed for elimination of background noise; because, we may inform this Court, the unprocessed tapes sounded, if anything, freer of any such extraneous noise than the processed tape.

Of course, there is one completely logical explanation of how it could have happened that this highly sensitive multi-directional microphone failed to hear practically any of the numerous and strikingly obtrusive noises that it should have heard in the agents' room, and this explanation would be that the microphone was not in the agents' room, but was in Nebbia's room. The Government has never given a satisfactory explanation of the puzzle as to why the Narcotics Bureau's microphone was so prejudiced against listening to typewriters, blaring radios, clanging telephone



bells, etc., in the agents' room and was so much more receptive to listening to voices in Nebbia's room.\*

As to the conduct of the hotel management in betraying Nebbia's privacy, Agent Kiere testified that Mr. Whiteman, of the Waldorf-Astoria staff, had told him that Room 1602 was the room which was to be "electronically surveyed" (*id.*, 124). Agent Shrier said he had no knowledge of anyone in the Narcotics Bureau asking the Waldorf-Astoria to assign Nebbia to a particular room (*id.*, 253). But the court prevented defense counsel from questioning other agents about this (Tr. June 7-8, 1966, pp. 128-129, 135-136, 215-217). Mr. Whiteman testified that the agents had requested a room as close as possible to Nebbia's room (*id.*, 151-152); he did not know whether any other hotel personnel had additional information about the circumstances of the renting of the two rooms involved (*id.*, 152); he did not have the hotel records pertaining to the renting of Nebbia's room, stating that the Government had taken those records (*id.*, 142); other records, which might have thrown light on the circumstances, had been destroyed (*id.*, 155-156).

In view of all of the foregoing it is difficult to understand the Court of Appeals' refusal to reopen the Waldorf-Astoria hearing. That refusal is in itself a ground for *certiorari* (Question Presented no. 3, *supra*). The interests of both the Constitution and of standards of decency demanded a reopening of that hearing upon the showing which we made to the Court of Appeals as above described. To have denied such reopening either on the idea that the

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\* We are aware that Agent Kiere drew attention to one or two instances of telephone noise or human voices which he thought might have come from the agents' room, but these instances are *de minimis* in relation to the size of the problem which we think the Government faces in answering the above question.

previous Waldorf-Astoria hearing had "adequately explored" the question of "trespass", or on the idea that we had already had one chance to convince a District Court Judge and must now resign ourselves, was to apply to the resolution of this profoundly important question of constitutional right and public morality too petty a standard of Federal appellate judicialty.

But even if *certiorari* relief is not to be forthcoming here to redress our claim of injustice in the refusal of the Court of Appeals to reopen the Waldorf-Astoria phase, the facts above summarized in regard to the Waldorf-Astoria bugging are believed to have afforded easily sufficient grounds for the Court of Appeals to conclude that, *on the existing record*, it was the duty of Federal appellate Judges to reject the District Court's finding of "no trespass" at the Waldorf-Astoria. And this Court can and should reject that finding, either on the grounds of acoustical and electronic science imported into this case by the presence of the double-door factor, or on the ground of the Agents' admissions as to actual physical invasion of Nebbia's private air space in preparing for the electronic installation, or on the ground of the Agents' use of the common electric current and wiring system to perpetrate an electronic invasion of privacy,\* or on the ground of connivance with the hotel management to betray the privacy of a paying guest, or on all of these and the other grounds which seem to us to be favored by the record herein and by the *Silverman* case policy of refusal to tolerate "trespass" or physical intrusion "by even so much as a fraction of an inch".

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\* Let police electronic snoopers at least be put to the necessity henceforth of using their own battery packs.

Finally and in any event, the rule which the Court of Appeals in *Pardo-Bolland* assumed to be declarative of the policy of this Court should be now expressly rejected. The test should not be trespass or physical intrusion; the test should be invasion of a constitutionally protected individual right of privacy against Governmental electronic intrusion—indeed, the stealthier the invasion, the more to be condemned.

## II. President Johnson's order of June 30, 1965.

In both of the Courts below we urged that if the Waldorf-Astoria bugging was done in defiance of a Presidential order it was unconstitutional because *ultra vires*.

The Solicitor General has alluded in papers filed by him in this Court, to a "policy" or "policies declared by the President on June 30, 1965, for the entire Federal establishment" which "prohibits such electronic surveillance or the use of such listening devices (as well as the interception of telephone and other wireless communication) in all instances other than those involving the collection of intelligence affecting the national security". These words appear in the Solicitor General's now famous two documents entitled "Supplemental Memorandum for the United States", one filed in *Black v. United States*, no. 1029, October Term 1965, at pp. 3-4; and the other filed in *Schipani v. United States*, No. 504, October Term 1966, at p. 4. In the *Black* memorandum the Solicitor General further said, "The specific authorization of the Attorney General must be obtained in each instance when this exception [national security] is invoked" (p. 4). In the *Schipani* memorandum the Solicitor General further stated that "such [national security] intelligence data will not be made available for prosecutorial purposes, and the specific authorization of the Attorney General must be obtained in each instance when the national security exception is sought to be invoked" (p. 4).

Counsel for the within petitioners have endeavored to find out from the Department of Justice in Washington what are the *exact textual* provisions of the above mentioned Presidential declaration of policy of June 30, 1965, but we have not been given an answer.

The reason why it is important, for present purposes, to find out if possible the exact terms of the President's policy statement of June 30, 1965, is that it is not clear from the Solicitor General's above mentioned memoranda in *Black* and *Schipani* whether the forms of electronic surveillance prohibited by the President are specifically described in relation to "trespassory" *versus* "non-trespassory" types; or whether they are described in terms of legality or illegality as laid down in any specific Court decisions; or whether the President has prohibited all forms of electronic surveillance.

One thing, however, is manifest without further inquiry. If the electronic surveillance done in the present case comes within the ban of the President's statement of June 30, 1965, it must follow as the night the day that the within judgments of conviction must be reversed. For it is unthinkable that any person should be convicted and imprisoned on evidence obtained by Federal Police in express violation of a prohibition by the President of of the United States and the Attorney General. The Government has conceded that the electronic bugging of Nebbia's hotel room in this case was not done with any authority or permission from the President or the Attorney General, but was done solely on the authority of the District Supervisor of the Federal Bureau of Narcotics, Mr. George M. Belk (R. 497-498). And, of course, the bugging here involved post-dated the President's order of prohibition by nearly six months.

Absent a valid applicable statute of Congress, can there be any question that no officer or employee of any of the "executive departments" of the Federal Government may act in exercise of *executive power* in defiance of a presidential prohibition? The point is so elementary and so axiomatic as a matter of constitutional doctrine that it seems ingenuous to emphasize it; this Court has several times had occasion to refer to the President's intrinsic supremacy over the executive departments through which he acts and which are merely his agents. "Executive power, in the main, must, of necessity, be exercised by the President through the various departments. These departments constitute his peculiar and intimate agencies \* \* \*". *Russell Motor Car v. United States*, 261 U. S. 514, 523. "The heads of departments are his authorized assistants in the performance of his executive duties \* \* \*" (*Runkle v. United States*, 122 U. S. 543). What should be perceived then, when any Federal law enforcement official disobeys a prohibition of the President, without valid statutory warrant for such disobedience, is that the offending officer is simply acting *ultra vires*. Once attention is focused upon this feature of *ultra vires* in such a situation, it becomes apparent immediately that the disobedient conduct of the offending Federal police officer visits, upon any person aggrievingly touched by that disobedient conduct, a denial of due process of law in the most literal and classic sense of those words. "Process of law" is "due" only when it is in accordance with "law". If it is without "law", or against "law", then *eo ipse* it is not "due process of law". Electronic surveillance done by a Federal police officer in defiance of a direct prohibition of the President of the United States is the act of a usurper. No "process" endured at the hands of a governmental usurper can ever be "due process".



The Court below refused to compel the Government to disclose the text of the President's order. This Court should apply its hand for this purpose.\*

### III. The Abortive Remand Hearing

As seen, the Court of Appeals remanded this case for a new hearing on electronic eavesdropping (except as to the Waldorf Astoria phase). See items XIII to XXVI, inclusive, of our listing of record items, *supra*, pp. 15-16 especially item XVIII, where the facts of the Government's obstructiveness and reluctance in the quest for the truth (prior to the remand hearing) as to its electronic activities in this case are recited; and item XXV, where the similar facts of the Government's conduct in the remand hearing itself are recited.

Against this background of obstructiveness by the Government we should have been granted the most plenary procedural facilities in the remand hearing. Specifically, the Government should have been required to submit its officers and records to unstinting examination. Instead, despite the *apparent* thoroughness of the remand proceeding, we were cut off from any real opportunity to probe the conclusory, self-serving "proof" of the Government denying "materiality" as to the two newly admitted trespassory buggings (see item XVI of the listing of record items, *supra*; and, again, item XXV, *passim*).

Certiorari should be granted to remand the case for a proper plenary hearing in which the Government may be compelled to make real disclosure, not merely a bureaucratic semblance of "disclosure".

(We regret the necessity, dictated by space limitations, of referring the Court to the copious record items XIII to XXVI on this subject.)

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\* See item XI of the record items listed *supra*.

## CONCLUSION

It is respectfully submitted that this joint petition for certiorari should be granted.

Respectfully submitted,

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[APPENDICES FOLLOW]



## APPENDIX A

### UNITED STATES COURT OF APPEALS

#### FOR THE SECOND CIRCUIT

No. 313—September Term, 1966.

(Originally argued January 19, 1967

Remanded for further limited hearing May 29, 1967

Decided October 13, 1967.)

Docket No. 30849

UNITED STATES OF AMERICA,

*Appellee,*

—against—

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC,  
JEAN NEBBIA and ANTHONY SUTERA,

*Appellants.*

Before:

MEDINA, ANDERSON and FEINBERG,

*Circuit Judges.*

Appeals by five appellants from judgments of conviction for violation of the federal narcotics laws, 21 U. S. C. §§173, 174, after a trial by jury before Edmund L. Palmieri, J., in the United States District Court for the Southern District of New York. Affirmed.

IRVING YOUNGER, New York, N. Y., *for Appellant Desist.*

FRED A. JONES, JR., Miami, Florida, *for Appellants Dioguardi, Sutura, LeFranc and Nebbia.*

DAVID M. MARKOWITZ, New York, N. Y., *for Appellant LeFranc.*

ARNOLD C. STREAM, New York, N. Y., *for Appellant Nebbia.*

ABRAHAM GLASSER, New York, N. Y., Of Counsel *for Appellants Dioguardi, Sutura, LeFranc and Nebbia.*

OTTO G. OBERMAIER, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York; Michael W. Mitchell, William M. Tendy, John R. Bartels, Jr., John R. Wing, Assistant United States Attorneys, on the brief), *for Appellee.*

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FEINBERG, *Circuit Judge:*

The five appellants were convicted under a one-count indictment charging them with a conspiracy to import narcotic drugs into the United States from France. 21 U. S. C. §§173, 174. The case involved what is alleged to be the largest single seizure of pure heroin in the United States, valued at sums as high as \$100,000,000, and totalling some 209 pounds. The trial, lasting four weeks, was in the Southern District of New York before Judge Palmieri and a jury. We affirm all five convictions for the reasons stated below.<sup>1</sup>

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<sup>1</sup> Each appellant adopts the arguments made by the others insofar as applicable. Therefore, we will identify the appellant on whose behalf a



## I. The Facts

The following statement of facts is what the jury could have found, viewing the evidence in the light most favorable to the Government. *Glasser v. United States*, 315 U. S. 60, 80 (1942). It was presented to the jury primarily through the testimony of co-defendant Herman Conder<sup>2</sup> and various government agents.

Early in 1963, Conder, a United States Army Warrant Officer, met appellant Samuel Desist, a Major; Conder was then looking for accommodations for his wife and children, who were soon to join him in France. Conder rented one of Desist's apartments, and thereafter the two became friendly. In July 1965, when Conder was preparing to return to the United States, Desist offered to pay him \$10,000 if Conder would ship a food freezer as part of his household goods. Desist told Conder not to tell the latter's wife because "women can't keep a secret." Conder agreed, and a used freezer was delivered to Conder, according to plan. At Desist's instruction, Conder took the freezer apart one day, left it in the storage area of his apartment, and found it completely reassembled the next day. Secreted into it were 190 plastic bags, each holding an average of a half-kilogram (1.1 pounds) of pure heroin.

In September 1965, the freezer was shipped by Conder, along with his other goods, to Fort Benning, Georgia; ten days later Conder and his family left for the United States. Once at Fort Benning, which is in the Columbus, Georgia area, Conder moved into a house trailer. The freezer

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point was originally urged only when the argument is peculiarly relevant to him.

2 The charge against Conder was severed at the start of the trial.

arrived in the third week of November; Conder immediately communicated this fact to Desist. On December 12, Desist flew from Paris to New York and called Conder, arranging a visit at the end of the week. Thus, the initial phase of the conspiracy—importing heroin—was successfully accomplished. There remained the efforts of Desist, with two other French exporters—Jean Claude LeFranc and Jean Nebbia—to dispose of the narcotics in this country.

On December 11, appellant Nebbia had left Paris on a plane bound for New York; five days later he went, together with appellant LeFranc, to an airline ticket counter in New York where LeFranc made a through reservation for Nebbia for Columbus, Georgia. LeFranc said that a car rented in Columbus would be used for driving to Miami. The night of December 16, Desist met with Nebbia in the Waldorf-Astoria Hotel, Manhattan. Desist said he would fly to Rochester "to see the boss" and from there by way of Atlanta to Columbus, where he would pay his contact "20 bills" for the merchandise. Nebbia was reassured that the contact was well-known to Desist; Desist said everything would be ready for Nebbia so "the transfer can be made automatically." There was an inquiry about suitcases, and Desist said it would take three or four hours to make the "transfer." Desist referred to a trailer, and the "Black Angus," a motel at which Conder had made a reservation for Desist; Nebbia said he would meet Desist in Columbus and cautioned about risks. On December 17, Nebbia and LeFranc went to buy a map together. Back at the hotel room LeFranc said he would go to Columbus from Atlanta and told Nebbia to get a car; they would purchase the suitcases. A trailer was mentioned in this conversation also.

While thus making sure of obtaining the heroin, Nebbia and LeFranc were simultaneously arranging to dispose of it. Also on December 17, appellants Frank Dioguardi and Anthony Sutera flew up to New York from Miami; in the afternoon they registered under false names at a Manhattan motel. That night LeFranc came out of a Manhattan bar and stood on the sidewalk, and Dioguardi and Sutera pulled up in a rented car and double-parked. LeFranc approached the car, had a short conversation, and entered it; the car was parked and the three went to Adano's Restaurant a few blocks away.

LeFranc told his companions he was looking forward to Atlanta, which was a cleaner place than New York, and said he would enjoy Miami; Sutera agreed with this observation and said he was also looking forward to returning to Miami. Dioguardi made a telephone call, during which he said that he was "with the man now and they were leaving for Atlanta in the morning," and that he expected to see him Monday or Tuesday the following week. Rejoining his companions, Dioguardi said everything was "o.k. . . . on my end," but there were several problems. Sutera said he and Dioguardi had not yet seen anything, and LeFranc replied that he had explained this to his friend who had assured him that "it is here already." LeFranc said that all that remained was to go down there, pick it up, and make the transfer to Dioguardi and Sutera. Dioguardi said that LeFranc's "friend" apparently didn't trust anyone; they too wanted to be careful, but at the same time wanted to know more about how the deal would come off. Sutera proposed that he and Dioguardi go to Atlanta with LeFranc to pick up the "merchandise" and save LeFranc an extra trip.

LeFranc said that was impossible; only he and his friend were to go to Atlanta and pick up the merchandise and then he would call Dioguardi and Sutera in Miami and arrange for the transfer to them. There was some more discussion about the mechanics of the transfer, LeFranc stating at one point that "in the past people have been betrayed, and everything has been lost, even the people." During dinner Dioguardi made another telephone call during which he stated that "this was a once-a-year deal and it takes time to iron out the problems." A day later, Dioguardi and Sutera flew back to Miami.

On the same day that LeFranc was meeting with the potential buyers, Desist flew to Rochester and thence to Georgia to get the heroin. That night Conder met him at the Columbus airport; Desist registered in the Black Angus Motel, and they both went to Conder's trailer. Conder told Desist the freezer was in a box adjacent to the trailer; Desist said certain persons would arrive the following afternoon at 2:00 to pick up its contents, and that Conder should arrange to have his wife away. Once at the trailer, Conder pointed out the freezer. On the next morning, Nebbia and LeFranc boarded a plane in New York bound for Atlanta; in Atlanta they changed planes for Columbus, and Desist met them at the Columbus airport that afternoon. Nebbia rented a car, ~~and the~~ three drove around and stopped at a restaurant. Desist was eventually left in the Columbus shopping area.

Nebbia and LeFranc continued driving around, winding up in Opelika, Alabama, about 4:00 P.M. There they purchased two suitcases, a foot locker and a travel bag. Arriving back in Columbus, they met Desist at the Black Angus; after a short while in Desist's room, Nebbia and LeFranc resumed their driving. Eventually, they registered at a

motel under a fictitious name. Repeatedly that day they drove in a way that would make it difficult to follow them unnoticed.

After Nebbia and LeFranc had left his motel room, Desist called Conder, and they met at a restaurant. Desist explained that the project would take longer than anticipated because the people who were to pick up the merchandise had returned to Atlanta to rent another car because they thought they had been followed. The pick up would be the following day; the people would be Frenchmen. (Nebbia and LeFranc spoke to each other in French.) Desist surreptitiously handed Conder \$2,000, and pointed out that Conder could buy suitcases in the morning if necessary. Conder rejected an offer of several hundred dollars or a car for taking the contents of the freezer to Atlanta.

On Sunday morning, December 19, Desist went to Conder's trailer camp and told Conder to buy the suitcases. After driving Desist back to the motel, Conder bought four large suitcases. Back at his trailer he removed all the plastic bags from the freezer and put them in the suitcases he had bought; he had to use two of his own as well. One suitcase was placed inside the trailer and five in a shed near the trailer. This was about 1:00 in the afternoon. After Desist called and checked, Conder waited for the Frenchmen, but they never arrived.

That same morning Nebbia and LeFranc had checked out of their motel, driven to Atlanta and rented another car. They met Desist in his motel room, and saw somebody as they were leaving who they thought might be watching them. Desist then called Conder and told him that the two had become suspicious and would wait several days before coming to pick up the suitcases. LeFranc and Nebbia



meanwhile headed for Atlanta and returned the second car they had rented. They took a cab to where the first rented car was, and returned that car too. Early Monday morning they boarded a plane for New York. A few hours later Conder was arrested at his trailer and produced the six suitcases containing the heroin.

The foregoing was the Government's case. The version of the facts offered by appellants is, of course, radically different. Thus, the testimony of various government agents was attacked as incredible; e.g., as to the account of conversations overheard by agents at the bar in Adano's Restaurant; defendants argued that conspirators would not conduct meetings there when strangers were present because the bar was so small; Dioguardi introduced affirmative evidence that he had been in New York on the day in question on business; Desist offered an alibi for the night he had a supposed conversation with Nebbia in the Waldorf-Astoria; LeFranc attempted to show that he was in this country only for purposes connected with his membership in a secret French political organization.<sup>3</sup> But these are now fruitless gambits; the jury by its verdict rejected them, and we are bound by that disposition.

## II. Sufficiency of the Evidence

All appellants urge reversal on the ground of insufficient evidence to go to the jury or for conviction under what they term "the rule of reasonable doubt." Dioguardi and Sutera argue first that there was no proof that either of them had the requisite knowledge that the narcotics were imported. There was no claim that these appellants ever had possession of the narcotics, so that the inference in

3 Nebbia and Desist also offered character testimony.

21 U. S. C. §174 could not aid the Government. See *United States v. Goldstein*, 323 F. 2d 753 (2d Cir. 1963) (*per curiam*), cert. denied, 376 U. S. 920 (1964). Judge Palmieri charged the jury that as to these two defendants "you must find actual knowledge that the drugs were illegally imported from abroad"; the judge also observed that the Government rested its case as to knowledge on LeFranc's statement to Dioguardi and Sutera (in Adano's Restaurant) "it is here already," and on "other evidence." Appellants contend that there was no "other evidence," and that "here" does not necessarily refer to the United States, considered as a country, but could as rationally mean one rather than another location within the United States. However, the conversation also referred to going down and picking "it" up in Atlanta. Hence, the jury could reasonably infer that "here," in a conversation taking place in New York, did not refer to the specific location of the narcotics in the United States, but rather to its arrival from overseas.

Dioguardi and Sutera also challenge the sufficiency of evidence that they conspired to deal in narcotics. There clearly was enough evidence to allow the inference that these two appellants were conspiring with LeFranc in Adano's about something. Dioguardi and Sutera had registered in New York under assumed names; while with LeFranc, Dioguardi told someone on the telephone that this was a "once-a-year deal"; LeFranc warned of the dangers for all; Dioguardi and Sutera sought to assure the transfer of "merchandise" to them, even suggesting that they go to Atlanta to assist; and their stake in, and concern over, the success of the venture was obvious. Cf. *United States v. Cianchetti*, 315 F. 2d 584, 588 (2d Cir. 1963). What the insufficiency argument is reduced to is that the word "narcotics" was not spoken at Adano's, so that the conspiracy

could have been to transfer something else." We pause to note that those who buy and sell narcotics normally use vague euphemisms or jargon to describe their contraband. See *United States v. Llanes*, 357 F. 2d 119 (2d Cir. 1966) ("stuff"); *United States v. Ramsey*, 374 F. 2d 192 (2d Cir. 1967) ("good 'treys'"). The basic defect of the argument is the assumption that the jury had to base its verdict against these two appellants solely on this conversation in the abstract. But, of course, this was not so. From the evidence of acts of other defendants, "verbal" or otherwise, properly before the jury,<sup>4</sup> it could have taken into account that Conder shipped a freezer to Fort Benning, Georgia; Desist knew Conder; Nebbia and LeFranc came to the United States; Nebbia knew Desist; Desist flew down to Georgia to meet with Conder; Nebbia and LeFranc shortly thereafter also flew down to Atlanta and met Desist; Conder transferred heroin from the freezer to suitcases; and then Nebbia and LeFranc went back to New York. These events happened within a short time (except for the initial arrival of the freezer into the United States). While it could be by coincidence that Dioguardi and Sutera were interested in other "merchandise" in Georgia that LeFranc was to transfer to them so furtively, it was a much more persuasive inference that the "merchandise" was to their knowledge narcotics. If to this is added the evidence of "hearsay" declarations of co-conspirators, there was obviously much more than enough to go to the jury, although we do not mean to imply that the evidence was insufficient without these declarations. Judge Palmieri had already decided that the declarations could be con-

<sup>4</sup> See *Lutwak v. United States*, 344 U. S. 604, 618 (1953); *United States v. Nuccio*, 373 F. 2d 168 (2d Cir.), cert. denied, 387 U. S. 906 (1967).

sidered by the jury and we find no error in that determination. *United States v. Ross*, 321 F. 2d 61, 68 (2d Cir.), cert. denied, 375 U. S. 894 (1963). Indeed, in allowing the jury again to make a preliminary determination as to the competence of this evidence, the judge was too generous to appellants. See *United States v. Stadter*, 336 F. 2d 326, 329-30 (2d Cir. 1964), cert. denied, 380 U. S. 945 (1965); *United States v. Ragland*, 375 F. 2d 471 (2d Cir. 1967). We hold that there was sufficient evidence to go to the jury on the role of Dioguardi and Sutera in the conspiracy. Finally, the mass of evidence against LeFranc, Nebbia and Desist does not warrant discussion as to its sufficiency.<sup>5</sup>

### III. Reception into Evidence of the Narcotics

One of the most important items of evidence produced by the Government was the vast amount of heroin seized from Conder in his trailer home in Georgia. Appellants claim that it was error to admit the heroin into evidence because the warrants authorizing the seizure were defective.<sup>6</sup> The point was first raised by a motion to suppress in the district court, which was denied by Judge Weinfeld; it was pressed again equally unsuccessfully at trial before Judge Palmieri.

5 We need not enter the controversy of whether the standard of ultimate persuasion ("beyond a reasonable doubt") is incorporated, as appellants assume, into the legal test of sufficiency of evidence, because the evidence met even this standard. For discussion of the problem, see Moore's Federal Practice—Cipes, Criminal Rules ¶29.06 (1966); *United States v. Leitner*, 202 F. Supp. 68, 693-94 (S. D. N. Y. 1962), *aff'd per curiam*, 312 F. 2d 107 (2d Cir. 1963); *United States v. Burgos*, 328 F. 2d 109, 110-11 (2d Cir. 1964).

6 A question of the standing of appellants to object to the seizure has been raised, but we do not have to reach it.

In support of warrants to search Conder's automobile and trailer and sheds, identical sworn statements by a narcotics agent were submitted to the United States Commissioner for the Middle District of Georgia. The statement is imposing in its detail.<sup>7</sup> It is claimed, however, that

- 7 The affidavit in support of the warrant to search the trailer and sheds stated, in relevant part, the following:

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as) Lot #30, in Bill Miller Trailer Park, 3318 Victory Drive, Columbus, Georgia where is located one Blue and White, in color, House Trailer residence of Herman Conder in the Columbus Division in the Middle District of Georgia, there is now being concealed certain property, namely a large quantity of Heroin which see attached affidavit which is a part of this Affidavit for Search and Seizure.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

1. In furtherance of a continuing investigation commenced in New York City, several weeks ago, which indicated that two individuals namely Jeanot Nebbia and Jean LeFranc, would proceed to Columbus Ga. to receive a tremendous shipment of heroin, the following facts are set forth to support my application for two search warrants.
2. Investigation in NYC indicated that Nebbia and Le Franc would proceed to Columbus Ga. on December 18, 1965 and would there meet and receive from an individual I now know to be using the name of Sam DeSist, about 100 kilograms of heroin.
3. On December 18, 1965 these two individuals did arrive in Columbus and did meet at the Airport Sam DeSist. They rented a car and drove to the Buckineer Restaurant. After a long conversation Nebbia and Le Franc were followed to Opelika Alabama, where there were seen to purchase 3 blue suitcases and a large foot locker.
4. They then returned to Columbus and again met with Sam DeSist at the Black Angus Restaurant. After a conversation, Nebbia and LeFranc departed and speeded back toward Atlanta, Ga. Desist was followed to his room at 108 Black Angus Motel. Shortly thereafter he was seen to meet and converse with one HERMAN CONDOR. He was heard to tell Conder that they had run into difficulties.
5. Conder then dropped DeSist off at his motel. The following morning De Sist was followed from his Motel to the restaurant. After breakfast he depart via taxi cab. He exited the cab and



the affidavit does not affirm personal knowledge of the facts, or the source of the affiant's belief, or the reliability of that source. For example, the affidavit states that "Desist was followed to his room"; appellants ask "By whom?" Appellants rely on *Aguilar v. Texas*, 378 U. S. 108 (1964), and *United States v. Ventresca*, 380 U. S. 102 (1965).

*Aguilar* involved an affidavit which merely stated that "affiants have received reliable information from a credible person and do believe that heroin . . . [is] being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." The Court noted that "[i]f the facts and results of . . . a surveillance [on petitioner's house] had been appropriately presented to the magistrate, this would, of course, present an entirely different case." 378 U. S. at 109 n. 1. After discussing other similar cases where the affidavit merely stated that the affiant "has cause to suspect and does believe" certain merchandise was in a specified location,<sup>8</sup> or where the affidavit

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then walked some 500 yards to the Bill Miller Trailer Park. He emerged from there in the Volkswagon driven by the aforementioned Condor. They were followed to the Gaylord Shopping Center. At this location they had a conversation. De Sist was heard to tell Condor to "get the merchandise ready to move".

6. Condor then again drove DeSist to his motel and then he returned to the Gaylord Store and purchased four red suitcases. He then immediately proceeded to his trailer at the aforementioned trailer park. He took the four suitcases either into the trailer or into the two sheds immediately next to it.
7. I would like search warrants for his vehicle and the trailer and its two sheds.

[signature]  
Francis E. Waters  
Narcotic Agent

[Typographical errors in original.]

8 *Nathanson v. United States*, 290 U. S. 41 (1933).

said simply that the suspect "did receive, conceal, etc.; narcotic drugs . . . with knowledge of unlawful importation,"<sup>9</sup> the Court stated (378 U. S. at 113-15):

Here the "mere conclusion" that petitioner possessed narcotics was not even that of the affiant himself; it was that of an unidentified informant. The affidavit here not only "contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein," it does not even contain an "affirmative allegation" that the affiant's unidentified source "spoke with personal knowledge." For all that appears, the source here merely suspected, believed or concluded that there were narcotics in petitioner's possession. The magistrate here certainly could not "judge for himself the persuasiveness of the facts relied on . . . to show probable cause." He necessarily accepted "without question" the informant's "suspicion," "belief" or "mere conclusion."

Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States*, 362 U. S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States*, 376 U. S. 528, was "credible" or his information "reliable." Otherwise, "the inferences from the facts which lead to the complaint" will be drawn not "by a neutral and detached magistrate," as

9 *Giordenello v. United States*, 357 U. S. 480 (1958).

the Constitution requires, but instead, by a police officer "engaged in the often competitive enterprise of ferreting out crime," *Giordenello v. United States*, *supra*, [357 U. S.] at 448; *Johnson v. United States*, *supra*, [333 U. S.] at 14, or, as in this case, by an unidentified informant. [Footnotes omitted.]

In the present case, there was more than a "mere conclusion"; the affidavit could only be reasonably read to mean that the signer conducted at least some of the investigation or spoke to those who had investigated and watched; the facts alleged show more than the affiant's mere suspicion, belief, or conclusion as to the location of the heroin; the magistrate could judge for himself the persuasiveness of the fruit of the investigation; there is no question of credibility of an "informant," since the affidavit obviously is chiefly derived either from the affiant's knowledge or that of fellow agents. The language in *Aguilar* about informants must be read in conjunction with the affidavit under scrutiny in that case. Thus, in *United States v. Ventresca*, *supra*, where the affiant had received his information from other investigators, the Court found "reason for crediting the source of the information" because "[o]bservations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number." 380 U. S. at 109, 111 (footnotes omitted).

The Supreme Court has frequently emphasized that it is desirable for officers to obtain search warrants so that an independent magistrate may impartially judge whether probable cause exists, and for that reason has suggested that warrants will be examined less rigorously than searches without a warrant. E.g., *United States v. Ven-*

*tresca*, 380 U. S. at 106-07; *McCray v. Illinois*, 386 U. S. 300, 315 (1967) (dissenting opinion).<sup>10</sup> When a narcotics agent has done just what the Court encourages, reading a warrant as though it were a trust indenture can only discourage adherence to that policy. If the affidavit here is "read in a commonsense way rather than technically," 380 U. S. at 109, it was clearly sufficient. We hold that the warrants were properly issued and the heroin was admissible at trial.

#### IV. Admissibility of Evidence Obtained Through Electronic Eavesdropping

Another evidence problem concerns conversations between Nebbia and Desist in the Waldorf-Astoria Hotel on the night of December 16, and between Nebbia and LeFranc on December 17. Evidence of these came mainly from testimony of a government agent who eavesdropped, and from contemporaneous tape recordings.<sup>11</sup>

Early in the pre-trial proceedings, the Government commendably informed both the court and defense counsel that an electronic listening device had been used in investigating the case, and suggested a hearing be held as to its legality. Thereafter, Judge Palmieri conducted a three-day hearing during which seven law enforcement agents and a Waldorf-Astoria Hotel employee testified; the hearing even included an actual reconstruction in the hotel room of the equipment that had been used. From the evidence adduced, the eavesdropping occurred as follows: A few days after Nebbia had

10 The dissenters in *McCray*, even though voting to reverse the conviction, explicitly recognized the principle.

11 Once again a question of standing is raised—at least as to Dioguardi and Sutera—but it is not necessary to reach it.

checked into the Waldorf-Astoria, two agents asked a hotel official in what room Nebbia was registered, and were given the adjoining room, Room 1600. Inspection of the agents' room disclosed that a door opened on to a "very small" air space, on the other side of which was a similar door opening into Room 1602, Nebbia's room. This door to Nebbia's room was never opened, nor was anything attached to it. The agents placed a microphone against the door inside of Room 1600, with its face turned toward a  $\frac{3}{8}$  inch space between the bottom of the door and the door sill. Nothing was placed under the door, nor was the microphone inserted into the space at the bottom of the door. The microphone was wired to an amplifier and tape recorder; the agents monitored conversations taking place in Room 1602.

Defendants advance a number of reasons why it was error to admit evidence of the two overheard conversations. First they argue that the eavesdropping was "trespassory" in effect and therefore impermissible under Supreme Court decisions, citing *Clinton v. Virginia*, 377 U. S. 158 (1964), reversing *per curiam* 204 Va. 275, 130 S. E. 2d 437 (1963), and *Silverman v. United States*, 365 U. S. 505 (1961). This was the contention made below, but Judge Palmieri found to the contrary. After the thorough evidentiary hearing, the judge concluded that "nothing has been adduced to indicate there was a physical trespass or any basis upon which the evidence should be suppressed. . . . [T]here was no illegality to the procedures followed by the agents and I therefore deny the motion [to suppress]." Appellants recognize that this court's recent decision in *United States v. Pardo-Bolland*, 348 F. 2d 316, cert. denied, 382 U. S. 944, 946 (1965), presents a formidable obstacle to them. In that case, similar electronic eavesdropping in a hotel room was held constitutional. Ascribing controlling effect—as the



Supreme Court has done—to the existence of a “physical intrusion”<sup>12</sup> in assessing the legality of electronic eavesdropping has been the subject of considerable discussion. See, e.g., Westin, *Science, Privacy, and Freedom: Issues and Proposals for the 1970's*, 66 Colum. L. Rev. 1205, 1232-53 (1966); The Supreme Court, 1960 Term, 75 Harv. L. Rev. 80, 184-87 (1961); President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 201-03 (1967). Appellants argue that *Berger v. New York*, 388 U. S. 41 (1967), contains language that supports the view that the type of non-trespassory eavesdropping present here is improper. However, the holding of that case is that a search that would otherwise be unconstitutional because of a physical intrusion was not cured by a court order under a statute which did not require sufficient safeguards. We are aware that these issues may again be examined closely by the Supreme Court in the near future. *Katz v. United States*, 386 U. S. 954 (1967) (granting certiorari; questions presented). However, we are bound by *Pardo-Bolland* and the cases upon which it relied;<sup>13</sup> appellants must distinguish them to prevail here.

Some appellants accept the challenge and point out that the standard of unconstitutional eavesdropping is not just technical “trespass,” but “an actual intrusion into a constitutionally protected area.” *Silverman v. United States*, 365 U. S. at 512. Therefore, they ask us to distinguish *Pardo-Bolland* on its facts. Thus, much is made of use by

12 *Silverman v. United States*, 365 U. S. 505, 509 (1961).

13 With admirable candor, appellant Desist's original brief concedes that it is “futile to argue here what has been foreclosed” by the Supreme Court, and admits that much of its argument is to preserve questions for possible Supreme Court review.

the agents here of the air-space between the two doors of Rooms 1600 and 1602, while in *Pardo-Bolland* there was only a single door, and in *Goldman v. United States*, 316 U. S. 129 (1942), only a common wall to which the listening device was attached. Appellants emphasize that the purpose of the air-space between the two rooms was to enhance privacy; this may be so, but a single door or wall also is intended to enhance privacy. That the air-space may have improved the possibilities for eavesdropping under expanding technology—as appellants claim and we will assume *arguendo*<sup>14</sup>—is not constitutionally significant under Supreme Court case law.

Appellants also claim that the hotel improperly cooperated with the agents, a feature possibly present in *Pardo-Bolland*<sup>15</sup> but apparently not considered material there by the parties or the court. However, the testimony of Agent Schrier, which Judge Palmieri was free to accept, disposed of any contention that the hotel's management surreptitiously placed Nebbia in a particular room or kept an adjacent room available for the agents.<sup>16</sup> We agree that the statement in *Hoffa v. United States*, 385 U. S. 293, 302 (1966), referring to reliance on "the security of" a hotel suite, is suggestive but in the context of the controlling cases the limited cooperation of the innkeeper here hardly seems dispositive. The final effort to distinguish *Pardo-Bolland* is the claim of actual trespass by one of the agents,

14 Appellants argue that the narrow air-space between the double doors separating the two rooms made the electronic installation a "parabolic mike" which invaded Room 1602's "acoustical barrier."

15 Appellant's Appendix at 22a-23a, *United States v. Pardo-Bolland*, 348 F. 2d 316 (2d Cir. 1965).

16 Although appellants were originally foreclosed from this line of inquiry, the matter was eventually aired at the preliminary hearing before Judge Palmieri.

who testified that he placed his ear against the door opening into Nebbia's room for a "matter of seconds" and heard nothing. One must strain to call this a "trespass" in the relevant sense; in any event, it led to nothing. Cf. *Goldman v. United States*, 316 U. S. at 134-35. Based upon the controlling precedents, which we find indistinguishable, we hold that there was here no "actual intrusion into a constitutionally protected area."

Apart from the variety of assaults on *Pardo-Bolland*, appellants offer additional arguments relating to the overheard conversations. Thus, they object to the use at trial of the contemporaneous tape recordings of the conversations. During the trial, there was an extensive two-day voir dire hearing, during which the tapes were played for the court and defense counsel, copies of transcripts of the tapes prepared by Agent Kiere were provided, and defense counsel were allowed to make their own copies of the recordings. At the end of the hearing, Judge Palmieri overruled all objections. Before the jury, Kiere first testified to the portions of the conversations he recalled over-hearing, and then the tapes were played with Kiere translating as the tape went along. The conversations were in French; appellants requested the trial court to appoint an impartial interpreter, who would make a simultaneous translation for the jury. The trial judge, who was fluent in French, as were Kiere and one or two colleagues of defense counsel, suggested a conference to arrive at an agreed-upon translation. The defendants rejected this procedure and Kiere acted as translator for what he had heard. Appellants claim that an impartial interpreter would have buttressed their conclusion that the tapes were unintelligible; under the admitted fact that the agent spent seventy-five hours on his own to translate the forty-five

minute tape, an impartial translator, they say, became essential for a fair trial. However, appellants were given ample opportunity to cross-examine the agent or bring in their own translator to rebut him.<sup>17</sup> Under the adversary system, the Government was allowed to use its agent as an expert witness, and the "unfairness" appellants allege is illusory. We have carefully considered this and other contentions; we hold that Judge Palmieri committed no error in connection with the tapes.

Another attack on the overheard conversations stems from recent admissions by the Solicitor General in the Supreme Court of trespassory eavesdropping; e.g., in *Black v. United States*, 385 U. S. 26 (1966) (*per curiam*), and *Schipani v. United States*, 385 U. S. 372 (1966) (*per curiam*).<sup>18</sup> Appellants claim that memoranda of the Solicitor General in these cases make clear that President Johnson issued a policy statement on June 30, 1965, under which all electronic eavesdropping—trespassory or not—is prohibited without prior authorization of the Attorney General, apparently not obtained here. Appellants also suggest, *inter alia*, that:

[I]t would be proper for this Court to request the Attorney General (or the Acting Attorney General), or the Chief Justice of the Supreme Court, to inquire of the White House (and if necessary of the President

17 Cf. *United States v. Giffert*, 25 F. Cas. 1287, 1312 (No. 15,204) (C. C. D. Mass. 1834) (Story, J.).

18 See Supplemental Memorandum for the United States, *Black v. United States*, 385 U. S. 26 (1966) (microphone penetrated molding of petitioner's suite); Supplemental Memorandum for the United States, *Schipani v. United States*, 385 U. S. 372 (1966) (microphone installed by means of a trespass at place of business where petitioner and others frequently met).



himself) as to what the President said on the occasion in question.

The Government responds that the President's policy merely emphasized to all federal agencies that any electronic surveillance was to be in full compliance with the legal standards established by the courts, which regarded the fact of trespass as crucial. This argument is supported by the fact that the same Solicitor General, upon whose memoranda appellants rely, filed another memorandum in the Supreme Court in October 1966—over a year after the claimed statement of policy—in opposition to an application for bail, which defended the validity of the eavesdropping in this very case and emphasized that there had been no trespass.<sup>19</sup> Similarly, according to one of the memoranda of the Solicitor General cited by appellants,<sup>20</sup> a memorandum of the then Acting Attorney General of November 3, 1966, addressed to all United States Attorneys, summarized the policy of the Department of Justice “in conformity with the policy declared by the President” as not proceeding with any investigation or case “which includes evidence illegally obtained or the fruits of that evidence.”<sup>21</sup> The presidential policy statement is not in the record before us,

19 Memorandum for the United States in Opposition (dated October, 1966), *Dioguardi v. United States* (Sup. Ct., Oct. Term 1966).

20 Supplemental Memorandum for the United States at 4-5 n. 3, *Schipani v. United States*, 385 U. S. 372 (1966).

21 We note also that the United States Attorney for the Southern District of New York, in a Supplemental Memorandum dated February 1, 1967, filed in this court, flatly takes the position that the “policy declaration” was such a “reaffirmation” of existing law. That the United States Attorney speaks for the Attorney General in these matters in this court is evidenced by the Memorandum, filed by him February 10, 1967, in *United States v. Borgese*, 372 F. 2d 950 (2d Cir. 1967) (*per curiam*), admitting that evidence collected by illegal wire tapping was used at the trial in that case and suggesting a new trial.



and we do not feel that the unusual procedure appellants suggest is appropriate or that it is incumbent on the court to attempt to devise some procedure to obtain it, particularly in view of the Acting Attorney General's statement. Therefore, we will not consider further the legal effect, if any, on the courts of an internal administrative statement.

Appellants also sought a direction from this court that the Solicitor General conduct in this case a review similar to those already had in *Schipani* and *Black* to discover whether there was use of "evidence obtained in violation of a defendant's protected rights."<sup>22</sup> Such a review was made and on April 27, 1967 we were advised by the United States Attorney that, in addition to the monitoring at the Waldorf, there were two other instances of electronic monitoring; both involved a trespass. By orders entered in May and June 1967, we thereafter remanded the case to the district court so that the trial judge could conduct a prompt and full hearing into these and any other electronic eavesdrops of any kind which related to this case (except for the Waldorf monitoring which had already been fully litigated). After a number of pre-trial conferences, Judge Palmieri held such a hearing. Fourteen witnesses testified on four separate days; various records of the Federal Bureau of Investigation were provided, and the record consumed over 800 pages of transcript.

In a thorough 37-page opinion, the judge found, *inter alia*, as follows: There was use in 1962-1963 of an electronic listening device installed by trespass in a business establishment in Miami, Florida by which conversations of

<sup>22</sup> Supplemental Memorandum for the United States at 5; *Schipani v. United States*.

defendant Dioguardi were heard. However, the investigation and conversations were totally unrelated to the evidence in this case, whose principal events occurred over two years later. There was another incident involving these defendants in December 1965 in Columbus, Georgia when a listening apparatus was installed by narcotics agents in a car rented to defendant Nebbia by Avis. However, the apparatus did not function and nothing coherent was obtained. Finally, the judge considered and rejected a claim made by defendants that at the Black Angus Motel in Columbus, Georgia federal agents had obtained evidence by other illegal activities. In sum, Judge Palmieri concluded that no showing was made "that any of the evidence used against them [defendants] at the trial was tainted by any invasion of their constitutional rights." Defendants attack the judge's findings of fact and conclusions of law on various grounds. We have considered them all and do not find them persuasive.

Finally, appellants also move for an order granting permission for an electronic consultant, hired after the trial below was completed, to inspect and listen to the tape recordings used at trial. The principal ground advanced for the motion is that the consultant might somehow be able to demonstrate that the tapes were a product of trespass. However, the suggestion of trespass was adequately explored by the trial court, and we see no basis for allowing the issue to be relitigated because defense counsel, as they concede, "simply 'missed' several meanings of the agents' testimony" before Judge Palmieri which they now "perceive." Accordingly, we hold that the evidence at trial of conversations at the Waldorf-Astoria was admissible.

## V. Refusal to Appoint an Interpreter

Appellant Nebbia contends that he was denied due process and a fair trial, as well as the rights of confrontation, presence at his trial, and effective assistance of counsel, by the trial judge's refusal to provide him at government expense with a court-appointed interpreter to render simultaneous translation of the proceedings.<sup>23</sup> It is not seriously disputed that Nebbia understands French but does not understand English well, if at all. He first asked for a translator without expense to himself during a pre-trial conference; the request was specifically not based on indigency—a position consonant with Nebbia's ability to post \$100,000 within a few hours at an earlier stage of the proceeding, see *United States v. Nebbia*, 357 F. 2d 303 (2d Cir. 1966). The question Nebbia poses, therefore, is whether a defendant has an absolute right to a free simultaneous translator.<sup>24</sup>

There is surprisingly little discussion of the issue in the cases. The Supreme Court has not ruled on the question, cf. *Felts v. Murphy*, 201 U. S. 123 (1906), although it has held that appointment of an interpreter when the defendant was testifying was discretionary with the trial judge, *Perovich v. United States*, 205 U. S. 86, 91 (1907). However, the discretion appeared related to evaluation of the defendant's ability to understand the interrogation and express himself in English. This court has apparently ruled on interpreters in criminal cases only rarely<sup>25</sup> and not on

<sup>23</sup> The other appellants contend that they were also prejudiced, but that claim is not impressive.

<sup>24</sup> See also *Ex Parte Roelker*, 20 F. Cas. 1092 (No. 11,995) (D. Mass. 1854).

<sup>25</sup> *United States v. Guerra*, 334 F. 2d 138, 142-43 (2d Cir.), cert. denied, 379 U. S. 936 (1964); *United States v. Paroutian*, 299 F. 2d 486, 490

the point here involved. The cases in this circuit and elsewhere have dealt in the main with the competence of the particular interpreter used<sup>26</sup> or whether there really was a language barrier,<sup>27</sup> particularly if, as in *Perovich v. United States*, *supra*, the defendant testified and the problem was whether he could adequately convey his thoughts to the jury.<sup>28</sup> That issue differs somewhat from the right to have a personal interpreter give a simultaneous translation of what is being said in the courtroom.<sup>29</sup> In *Tapia-Corona v. United States*, 369 F. 2d 366 (9th Cir. 1966) (*per curiam*), the court held that a Spanish-speaking defendant was not entitled to "have all English testimony . . . instantly interpreted to him" in view of the fact that "[t]he official Spanish interpreter sat at the defense counsel table and was available for immediate consultation." However, to the extent that the case impliedly recognizes at least a right to an "official" interpreter, it is helpful to *Nebbia*; but it is not clear from the opinion in that case whether appellant was indigent. See also *Chavira Gonzales v. United States*, 314 F. 2d 750, 752 (9th Cir. 1963).

A number of serious weaknesses in *Nebbia's* legal position emerge from the record. Thus, facilities available to

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(2d Cir. 1962); cf. *Barber Asphalt Pav. Co. v. Odass*, 85 F. 754, 756 (2d Cir. 1898).

26 E.g., *Thiede v. Utah*, 159 U. S. 510, 519-20 (1895) (use of juror as interpreter held not prejudicial); *United States v. Guerra*, *supra* note 25; *Lujan v. United States*, 209 F. 2d 190, 192 (10th Cir. 1953); *United States v. Gonzalez*, 33 F. R. D. 276, 279 (S. D. N. Y. 1958).

27 *Pietrsak v. United States*, 188 F. 2d 418, 420 (5th Cir.), cert. denied, 342 U. S. 824 (1951).

28 *Suarez v. United States*, 309 F. 2d 709, 712 (5th Cir. 1962); cf. *Kane v. American Tankers Corp.*, 219 F. 2d 637, 641 (2d Cir. 1955).

29 See *Gonzales v. Virgin Islands*, 109 F. 2d 215, 217 (3d Cir. 1940) (assuming *arguendo* constitutional right, but finding no inability to understand English).

him during the proceedings below included a French-speaking partner in the law firm retained by him and its employees or contacts.<sup>30</sup> Moreover, even though trial counsel was not fluent in French, Judge Palmieri stated, after the trial, that from his own observation he had no doubt that Nebbia had been sufficiently in communication with trial counsel to permit the latter "to conduct a vigorous and able defense in [Nebbia's] behalf."<sup>31</sup> In addition, in the posture the issue comes before us, we must assume—and it is a reasonable assumption—that Nebbia was quite able to afford an interpreter and to find a qualified one. Under these circumstances, if the real point is guarantee of a fair trial, it is a little difficult to see why Nebbia is not required to lie in the bed that he made. We are aware that trying a defendant in a language he does not understand has a Kafka-like quality, but Nebbia's ability to remedy that situation dissipates substantially—perhaps completely—any feeling of unease. In other words, if Nebbia denied himself the interpreter and stands on his right to do so, does not the issue become solely who should have paid for one?<sup>32</sup> Moreover, we doubt that Nebbia's claimed absolute constitutional right to an interpreter is stronger than the

30 The French Embassy originally asked the firm to represent Nebbia.

31 Although Judge Palmieri accepted counsel's representation that he was not conversant in French, the record clearly shows that the judge believed the defense was not hindered by a communication barrier.

32 At one point in the pre-trial hearings on eavesdropping, the Government provided an interpreter whose services were used for an entire day. At the beginning of the next day, Nebbia's counsel stated "I want to be certain that this is not going to be an expense incurred by the defendant"; when told that defendant would have to pay, counsel "disassociated" himself from the interpreter.

Indeed, the suggestion made here—but apparently not in the trial court—is that the trial judge should have appointed an interpreter and required Nebbia and the Government to abide the outcome of the case to determine who would pay for the interpreter's service. Cf. 28 U. S. C. §1918(b).



absolute right to a court-appointed counsel; the latter is held only by the indigent, *Gideon v. Wainwright*, 372 U. S. 335, 339-40 (1963); *United States v. Arlen*, 252 F. 2d 491, 495 (2d Cir. 1958). See also *Cervantes v. Cox*, 350 F. 2d 855 (10th Cir. 1965).<sup>33</sup> From *Nebbia's* point of view, we think the most persuasive approach is the point made at oral argument that if the Government chooses to prosecute someone, the burden rests upon it to furnish the basic apparatus for intelligible and minimally comfortable proceedings, e.g., the physical accoutrements of a trial, such as a stenographer or even the courtroom itself, neither of which is billed to the defendant. Indeed, a full-time interpreter is now provided by the Government in the District Court of Puerto Rico at apparently no expense to any defendant who needs one.<sup>34</sup> This undoubtedly reflects a judgment that the need for an interpreter in that district is so great that sound administrative principles require that one be available at all times. However, to elevate this resolution of a local problem to the status of a constitutional requirement for all districts and all defendants and all languages is another matter.

Appellants also rely on Fed. R. Crim. P. 28(b), which provides:

*Interpreters.* The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the court may direct.

33 The Criminal Justice Act of 1964, 18 U. S. C. §3006A(e), provides that payment for services "necessary to an adequate defense" shall be directed by the court out of appropriated Treasury funds, upon a finding "that the defendant is financially unable to obtain them."

34 1966 Jud. Conf. Rep. 59.

The rule was approved by the Supreme Court on February 28, 1966, and was reported to Congress on the same day. 383 U. S. 1088-89. The Court's order provided that the rule "shall take effect on July 1, 1966, and shall govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending." *Id.* at 1089. By July 1, the trial was well under way, and for all that appears in the record the rule was first mentioned on July 7, when the trial judge and appellants' counsel stipulated that appointment of an interpreter at that point—as the judge offered—could not cure any error which might have been committed earlier. We agree, of course, with the stipulation. The Government urges that the rule could not have been used by Judge Palmieri because it only applies to indigents,<sup>35</sup> and, in any event, did not go into effect until over two weeks after the trial started. Although we note as to the former argument that the rule is not so limited by its text, and as to the latter that another recent rule amendment has been applied retroactively,<sup>36</sup> we need not deal with these questions. Assuming *arguendo* that the court had the power to appoint an interpreter, the question was still one of discretion. Although the judge did have grave doubts as to his power, we note that among the factors also influencing him were Nebbia's ability to get and pay for an interpreter of his own choice, the avail-

35 For this interpretation, the Government relies on part of the note of the Advisory Committee:

General language is used to give discretion to the court to appoint interpreters in all appropriate situations. Interpreters may be needed to interpret the testimony of non-English speaking witnesses or to assist non-English speaking defendants in understanding the proceedings or in communication with assigned counsel. [Emphasis added.]

36 *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U. S. 129 (1967).

ability of French-speaking partners of his trial counsel, and Nebbia's ability to communicate with defense counsel. It is true that Judge Palmieri did offer to appoint an interpreter after the concededly effective date of the Rule. However, whether he would have done the same thing before the trial started, weeks before that effective date, if the Rule had been raised by defendants is another matter. We are not convinced that he would have, and, in any event, would not consider failure to do so under these circumstances an abuse of discretion.

We have considered the question carefully; taking all of the factors mentioned above into account, we hold that the failure to appoint a simultaneous interpreter at the Government's expense was not reversible error.

## VI. Miscellaneous

Appellants' remaining contentions do not require extensive comment. Appellants complain of allegedly improper publicity; shortly after commencement of the trial, an article appeared in a New York City newspaper describing Dioguardi as follows: "Frank Diaguardi [*sic*] 42, identified by the Government as an underworld figure here." The defendants requested a hearing to determine if the Government had supplied the information attributed to it. Judge Palmieri inquired of the two prosecuting attorneys, who denied giving the information; decision on the motion for a hearing was reserved. The judge later satisfied himself that no juror had read the article." However, appellants claim that a hearing should have been held on whether the Government had, in fact, "leaked" the information. Citing *Sheppard v. Maxwell*, 384 U. S. 333 (1966), they

37 Appellants do not claim to the contrary.

argue that a prophylactic rule is called for, turning not on prejudice to a defendant; but upon "the honor of the sovereign." But cf. *Chapman v. California*, 386 U. S. 18 (1967). We are most aware of the Supreme Court admonition in *Sheppard* that (384 U. S. at 363):

The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.

However, since prejudice was neither demonstrated here nor probable—and is indeed not even claimed<sup>38</sup>—we do not read *Sheppard* as requiring that the convictions be vacated. *United States v. Arnone*, 363 F. 2d 385, 393-96 (2d Cir.), cert. denied, 385 U. S. 957 (1966); *United States v. Bowe*, 360 F. 2d 1, 12 n. 9 (2d Cir. 1966), cert. denied, 385 U. S. 961 (1966). However, we do not think that "identification" by a government employee of a defendant in the midst of a criminal trial as "an underworld figure" is an incident to be taken lightly, if it occurred.<sup>39</sup> Therefore, in future similar situations, we would regard as desirable the holding of a hearing by the district court at a convenient time to find out who, if anyone, spoke for the "Government," so that proper measures could be considered, e.g., transmittal of the hearing transcript to the appropriate bar association

38 We note but need not consider that the newspaper reference complained of was only to Dioguardi, but the point is pressed also by Desist.

39 Cf. Special Committee on Radio, Television & the Administration of Justice (Judge Harold R. Medina, Chairman), Ass'n of the Bar of the City of New York, Freedom of the Press and Fair Trial, Final Report with Recommendations 14-26 (1967).

or to the employee's supervisor. We, of course, do not suggest that the two attorneys directly asked by the trial judge furnished the information, in view of their denials in open court.

Finally, objection is made to the manner in which Judge Palmieri handled a communication from the jury. During its deliberations, the jury sent in the following note:

We would like Agent Gruden's and Agent Smith's testimony as to what was overheard at the bar at Adano's restaurant.

These agents had testified to the crucial conversation discussed above between Dioguardi, Sutera and LeFranc in Adano's Restaurant on the night of December 17. Thereafter, the judge had a good portion of the agents' testimony read to the jury. However, he refused appellants' request that there also be read the bulk of the cross-examination of the agents, principally dealing with their ability to hear what they said they heard. The judge ruled that this was not the agents' "testimony as to what was overheard." Interpretation of the note was clearly a matter of discretion; while it could have been read more broadly, the trial judge's construction was not unreasonable. Under these circumstances, we find no error in his ruling.

We have considered the other contentions made by appellants in this court and find them without merit. The judgments are affirmed and all motions not already disposed of are denied.



**APPENDIX B**

(Filed—August 30, 1967.)

CR 101-A OPIN 397  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
66 Cr.

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UNITED STATES OF AMERICA

—against—

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC,  
JEAN NEBBIA and ANTHONY SUTERA,

Defendants.

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## Appendix B

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PALMIERI, J.

## PRELIMINARY STATEMENT

This case, presently *sub judice* before the Court of Appeals after a trial completed before this Court on July 11, 1966, was remanded by order of that court dated May 29, 1967, "so that the trial judge may conduct a prompt and full hearing to ascertain the Government's use of electronic equipment on the occasion referred to on page 2 of the \* \* \* letter from the United States Attorney" dated April 27, 1967, addressed to the Clerk of the Second Circuit.<sup>1</sup> The letter of the United States Attorney<sup>2</sup> refers to two instances of electronic eavesdropping: (1) One took

<sup>1</sup> The order of the Court of Appeals is reproduced as an appendix hereto.

<sup>2</sup> This letter, in full, is reproduced in the appendix hereto.

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place on Columbus, Georgia, on December 18, 1965 (the Avis car rental incident), and provided no evidence of any kind since the equipment malfunctioned, and (2) the second took place between April 25, 1962, and April 1, 1963, and consisted of an electronic listening device used in a business establishment in Miami, Florida (the Casa Maria-Dorey surveillance). This will be discussed fully.

In its order the Court of Appeals directed that "at such hearing the district court will confine the evidence presented by both sides to that which is material to questions of the content of any electronically eavesdropped conversations overheard on these occasions, and of the relevance of any such conversations to petitioners' subsequent convictions". On June 14th the Court of Appeals handed down a supplementary order of which counsel were advised at a conference held on June 14th.<sup>8</sup> The order stated, in substance, that the defendants were to be allowed "to explore, in addition to the incidents described in the letter of April 27, 1967 to the Clerk from the United States Attorney, the question of whether any governmental personnel engaged in any other electronic eavesdropping of any other kind which related to this case. . . ."

At conferences between Court and counsel on June 19th and July 6th, defendants' counsel repeatedly urged that they be given additional time to complete their investigation and on a number of occasions requested the production of approximately 40 witnesses, many of them law enforcement officers of high echelon. After lengthy discus-

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<sup>8</sup> Conferences between Court and counsel were held on June 7, 1967, and again on June 14th, with a view to setting dates for the evidentiary hearings, settling questions of representation and arranging for the appearance of the defendants at the hearings.

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sion with counsel, the Court requested the presence of the supervising agent in charge of the Miami, Florida, office of the Federal Bureau of Investigation and the narcotics agent in charge of the investigation of the case in the Atlantic-Columbus area. These witnesses, agents Swinney and Matuoizzi, were called as a matter of caution, in order to complete the proof adduced by the Government with respect to the Casa Maria-Dorey surveillance and the Avis car rental incident. In both instances the evidence indicated that there was no relationship whatever between the incident and the proof adduced against the defendants in this case.

The Casa Maria-Dorey incident related to an investigation by the Federal Bureau of Investigation through its Miami office, which was totally unrelated to any of the evidence in the case. It developed that the defendant Dioguardi participated or appeared to have participated in some of the conversations which were overheard. However, nothing that was said by Dioguardi, and no reference made to him in any of these conversations, had any possible relationship to the evidence in this case. Clerks of the Federal Bureau of Investigation listened to tapes of these conversations and transcribed notes of them. The transcribed notes were quite voluminous and were marked in evidence at the hearing. (Government's exhibits 102 and 103.) However, only the relevant portions, that is, those portions relating to the defendant Dioguardi, were revealed to counsel (Government's exhibit 103.) These were the portions which reported the conversations in which he participated or the conversations in which it was believed he was one of the speakers. The portions which were not revealed to counsel (Government's exhibits 100 and 102) were ordered sealed by the Court and have been preserved for appellate scrutiny.

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These transcribed notes indicate that there was no relationship between the eavesdropping and the evidence in this case. Indeed they proceeded the events to which this case related by approximately two years.

The Avis rental car episode took place in Columbus, Georgia, on December 18, 1965, shortly before the arrests of the defendants and the heroin seizure which led to the indictment in this case. On this occasion, an apparatus was installed in an automobile rented to the defendant Nebbia by the Avis car rental agency. Through this apparatus the narcotics agents engaged in surveillance of Nebbia hoped to overhear conversations between Nebbia and his co-conspirators. The apparatus did not function. It gave only static and unintelligible noises from which no evidence could be secured. In addition, it should be pointed out that the defendant Nebbia customarily spoke in French. The only French-speaking agent seeking to listen in on the conversations was Agent Kiere, who testified at length at the trial and also testified at the hearing before this Court on June 26, 1967. His testimony as well as corroborating testimony by Agents Waters, Matuozzi and Selvaggi, provided clear and persuasive proof that the apparatus did not function and that nothing coherent was obtained.

The only other episode related to eavesdropping on conversations in the room occupied by the defendant Nebbia at the Waldorf-Astoria Hotel in New York City between December 14-18, 1965. This eavesdropping was much bruited at the trial and was fully explored by the defendants both at trial and at *in camera* hearings during the trial. This matter is the subject of review in the appellate proceedings and needs no elaboration here since this episode was not deemed to be within the purview of the broadened frame of reference as set forth in the order of the



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Court of Appeals of June 14, 1967. For these reasons the defendants were not permitted to re-explore the Waldorf-Astoria eavesdropping episode.

In sum, there is no persuasive evidence before this Court that defendants' rights were impinged upon in any way by any electronic eavesdropping activities of the government agents.

The defendants were given whatever time they requested to complete their investigation and a full opportunity to present evidence indicating a violation of their rights. Evidentiary hearings were held before the Court on June 26, July 11 July 18 and July 25. The government witnesses, whether called by the defense or produced by the Government on his own initiative, or at the Court's request, all proved to be accurate and reliable witnesses, and they supported in various ways the conclusion above stated.

Subsequent to the Court of Appeals' order of May 29, 1967, the defendants hired an investigator, one John G. (Steve) Broady. As a result of his efforts he interviewed and obtained as defense witnesses two men of advanced years, Mr. Charles B. Brown, former night manager of the Black Angus Motel at Columbus, Georgia, and Mr. Oscar H. Kennington, who is still employed as the day manager at the motel. They testified before this Court on July 18, 1967. Their testimony, construed in the light most favorable to the defendants, would indicate that part of the Government's proof in the principal case was derived from electronic eavesdropping, separate and apart from the Waldorf-Astoria surveillance; that there had been a search of defendant Desist's room by narcotics agents at the Black Angus motel; and that a telephone conversation by Desist in a foreign language, presumably French, had been overheard at the motel switchboard by narcotics agent Waters.

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The testimony of Brown and Kennington was seriously impugned by the Government as a matter of accuracy and several narcotics agents expressly contradicted its purport.

The written statements purported to have been given by Brown and Kennington to Broady (defendants' exhibits G and H for identification) were used to refresh their recollection and as a basis for impeachment. In a number of instances the written statements appeared to be more favorable to the defendants than the testimony which Messrs. Brown and Kennington gave at the hearings. These statements were not accepted by this Court as independent proof of any probative value apart from the testimony of the witnesses. (See conclusion of law No. 4.) Indeed the defendants in their brief before this Court come very close to questioning the credibility of these witnesses, saying that "the dispositive formulation of the credibility question at this time (as to Brown and Kennington) is not whether through their testimony the defendants have proved unconstitutional electronic eavesdropping, but whether a sufficiently probative indication thereof has been achieved to justify allowing the defendants a further opportunity for more or less plenary hearing."<sup>4</sup> This statement, standing alone, is more pettifogging than persuasive.

The Court was frequently confronted by defense demands for procedures which would have amounted to a grandiose fishing expedition. Apparently unmindful of the burden resting upon the accused attacking the propriety of evidence to establish the fact that such evidence was illegally obtained (see conclusion of law No. 5); the defendants sought to make the hearing a continuing exploration of massive breadth, a grand inquest. Had such exploration

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<sup>4</sup> Defendants' brief, p. 22.

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been pursued, it would have consumed a very considerable amount of time, to say nothing of the expense to the Government and the serious inconvenience to this Court and to many government agencies.

However, the Court did give both sides the fullest opportunity to present any evidence they wished.<sup>5</sup>

The Government's proof was forthright and persuasive and established beyond any possible doubt that the evidence against each of the defendants in this case was not tainted. The Assistant United States Attorney in charge of the trial, Mr. William Tendy, was called by the defendants and examined under oath. His testimony alone, coupled with the reasonable inferences to be drawn from it, establishes that no eavesdropping evidence of any kind was used against any defendant in the case, except the carefully examined Waldorf-Astoria surveillance of December, 1965, which is part of the trial record. The defendants have not sought to impugn Mr. Tendy's testimony. Further, it was forcefully corroborated by the twelve government witnesses who testified at the hearings. In the second *Nardone* case,<sup>6</sup> famous because of the "fruit of the poisonous tree" doctrine, Mr. Justice Frankfurter stated:

"The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that

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<sup>5</sup> Although the last evidentiary hearing took place on July 25, 1967, it became necessary to await the transcription of the minutes and the submission of the briefs before the matter could be deemed to be fully submitted. Despite the allowance of a schedule in accord with the defendants' wishes, and extensions of time within that schedule, the case was not, in fact, fully submitted until August 25, 1967.

<sup>6</sup> *Nardone v. United States*, 308 U. S. 338, 341-42 (1939).

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wiretapping was unlawfully employed and that claims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity and not be merely a means of eliciting what is in the Government's possession before its submission to the jury."

Here, far from supporting their claims upon any solid basis, the defendants have put forward nothing better than conjecture or surmise, while the Government's proof is clear and persuasive that no portion of its case was tainted by any invasion of the defendants' constitutional rights.

The findings of fact and the conclusions of law which follow are set forth in amplification of what has already been said and are intended to demonstrate that there were no eavesdropping incidents of any kind, other than those mentioned, and that none of them tainted the evidence against any of the defendants.

**FINDINGS OF FACT***Casa Maria-Dorey Surveillance*

1. From April 25, 1962 to April 1, 1963, an electronic eavesdropping device was maintained at a business establishment, known variously as the Casa Maria Restaurant or Dorey's, and located at 150 Sunny Isle Boulevard, Dade County, Florida. The manner in which this surveillance came to the attention of the prosecuting officers in this case after the conclusion of the trial was as follows:

Pursuant to the review procedure initiated by the United States Department of Justice in *Schipani v. United States* (see finding of fact 19, *infra*), the Assistant Attorney General, Criminal Division, by memorandum dated Jan-

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uary 12, 1967, requested the Director of the Federal Bureau of Investigation to ascertain the nature and extent of any electronic surveillance of any of the defendants in this case. This request was forwarded the same day to Special Agent J. Wayne Swinney of the Miami office of the Federal Bureau of Investigation, supervisor of the criminal intelligence program in the geographical jurisdiction of the Miami office and in charge of the electronic surveillance activities of that office. Agent Swinney was requested to ascertain whether any of the defendants were overheard on any electronic device in the Southern Judicial District of Florida. In response, Special Agent Swinney forwarded the complete logs of the Casa Maria-Dorey surveillance to the United States Department of Justice.

2. The Government conceded that the Casa Maria-Dorey surveillance was achieved by trespass.

3. The Casa Maria-Dorey electronic surveillance was not directed against any of the defendants in this case, nor did it lead in any way to any Federal law enforcement activity involving any of them. Its subject was one Ricci, an individual totally unrelated to this prosecution.

4. On the following dates in 1962, the defendant Frank Dioguardi was positively identified as a participant in the conversations or activities overheard by the Casa Maria-Dorey surveillance:

October 12 (GX 2)\*

October 14 (GX 10)

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\* The prefix "GX" refers to the Government's Exhibits introduced at the hearings.



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October 30 (GX 11)  
November 2 (GX 5)  
November 4 (GX 12)  
November 6 (GX 6)  
November 7 (GX 7)  
November 8 (GX 8)  
November 30 (GX 9).

5. On several other occasions in 1962, the defendant Frank Dioguardi, although not positively identified, was thought to be a possible participant in the conversations or activities overheard by the Casa Maria-Dorey surveillance. These occasions were:

September 12 (GX 1)  
October 26 (GX 3)  
November 1 (GX 4).

6. At no time were any of the other defendants participants in any conversations or activities overheard during the Casa Maria-Dorey surveillance.

7. Following regularly established office procedure, the conversations or activities overheard by the Casa Maria-Dorey surveillance on the dates specified in findings of fact 4 and 5 were monitored by clerks in the employ of the Federal Bureau of Investigation, in Miami, Florida. The clerks recorded the activities or conversations overheard on daily logs. The time of the occurrence, and the initials of the auditor were also recorded.

When the matter overheard did not appear pertinent, only handwritten notes were taken, and were summarized on the log sheets (*e.g.*, the weather; the price of automobiles). Any uncertainty was to be resolved in favor of

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relevance. The summary would be based solely upon what was overheard and would not contain any other material.

Where relevant information was revealed the handwritten notes were supplemented by a tape recording of the conversation. Later the clerks would replay the tape, and, comparing it with the handwritten notes, would attempt to obtain a verbatim transcript of the conversation which would then be entered in the log. As soon as the log sheets were typed, the handwritten notes were destroyed pursuant to the regular procedure.

Any tapes resulting from the installation were retained for a period of seven days and then erased pursuant to the regularly established office procedure. None of the tapes resulting from the Casa Maria-Dorey installation were retained beyond a seven-day period and were all erased no later than April 8, 1963.

The logs comprise the most complete record kept by the Federal Bureau of Investigation of the conversations and activities overheard by the Casa-Maria Dorey installation.

8. All of the log sheets resulting from the Casa Maria-Dorey surveillance were produced for the Court's inspection and marked GX 100. The Court has examined all of the log sheets comprising GX 100 and finds that the only defendant overheard during the Casa Maria-Dorey surveillance was Frank Dioguardi, who was overheard only on the dates specified in findings of fact 4 and 5.

9. The complete log for each of these days was collated and collectively marked GX 102. The specific portion of each of the logs pertaining to Dioguardi were bracketed in ink on GX 102 and separately collated as GX 103.

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(Copies of GX 103 [GX 103-A, -B, -C, -D] were furnished to defense counsel on June 21, 1967, five days prior to the taking of any testimony, as well as during the taking of testimony. In addition, GX 103 was later introduced as a Government Exhibit.)

After *in camera* examination, the Court finds that GX 103 truly comprises all those portions of GX 100 and 102 in which any defendant in this case was a participant or a possible participant. The Court order GX's 100 and 102 sealed for appellate review. There is no relevant connection between any of the remaining material and any of the defendants, this prosecution, or the issues of this hearing.

10. None of the conversations or activities recorded in GX 1 through 12, and GX 103, has any relevance to any of the evidence introduced at the trial or the subsequent conviction of any of the defendants.

11. No electronic surveillance of any kind [either by trespass or without trespass] other than that described in findings of fact 1 through 5, was conducted by personnel of the Miami office of the Federal Bureau of Investigation against any of the defendants in this case or which related to or affected this case.

12. At the time of the trial the office of the United States Attorney for the Southern District of New York had no knowledge of the Casa Maria-Dorey surveillance nor of the contents of the logs.

*The Avis Car Rental Incident*

13. On December 18, 1965, in Columbus, Georgia, agents of the Federal Bureau of Narcotics installed an electronic

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listening device in a yellow Plymouth automobile owned by the Avis Rent-a-Car System. Later that day the automobile was rented by the defendant, Jean Nebbia.

14. At various times the defendants Jean Nebbia, Jean Claude LeFranc and Samuel Desist were present in the automobile.

15. The listening device malfunctioned, gave only static noise, and revealed no intelligible sounds. Therefore no recordings were made, no notes were taken and no reports were prepared.

16. The use of the electronic listening device was totally abandoned during the early morning hours of December 19, 1965, when surveillance of the subjects was discontinued. When visual surveillance was resumed later that morning by agents of the Federal Bureau of Narcotics it was undertaken in a different automobile. The agents did not use or attempt to use any listening device in the new automobile.

17. No electronic surveillance of any kind, except that described in findings of fact 13 through 16, and that conducted at the Waldorf-Astoria was conducted by agents of the Federal Bureau of Narcotics during the investigation of the crime charged in the indictment or which affected or related to the case.

18. The office of the United States Attorney for the Southern District of New York had no knowledge of the installation of the device in the Avis-Rent-A-Car automobile at the time of the trial.

*Appendix B**The Results of the Investigative Procedures Initiated by the Schipani case Demonstrate Absence of Tainted Evidence in this Case.*

19. Pursuant to the review procedure initiated by the United States Department of Justice, see *Schipani v. United States*, No. 504, Oct. Term 1966, Assistant Attorney General Vinson, in charge of the Criminal Division, requested by letter to David C. Acheson, Esq., the Special Assistant (for Enforcement) to the Secretary of the Treasury, that the following information be furnished regarding all pending prosecutions for violations of the Federal Narcotic Laws:

- “(a) whether any of the individuals were subject to electronic surveillance by the investigating agency;
- “(b) if any were, did the electronic surveillance consist of wiretapping or an electronic eavesdropping device;
- “(c) if the latter, please advise us of the method of entry utilized in the placement of the device;
- “(d) when, by date, did the electronic eavesdropping take place and where did it occur, that is, at the individuals home, office, or other location;
- “(e) whether the named individuals appear to be present at, or participating in, conversations overheard by an electronic device which are reflected in any recordings, transcripts, logs, notes, memoranda, or other records of any such device;
- “(f) if so, and if such recordings, transcripts, logs, notes, memoranda and other records still exist, would you please make them available to us;



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- “(g) did the information from any such device appear directly or indirectly in reports made in reference to the individuals by the agency. If so, would you please advise us of the reports in which such information appeared and furnish us with copies of these reports if you have not already done so;
- “(h) if any information was obtained from electronic surveillance, to your knowledge was such information communicated in any manner to any other Federal agency;
- “(i) if so, to whom was the communication made, when was it made, and what is the nature of the information communicated.” (GX 16)

The purpose of the Department of Justice inquiry was to determine “whether electronic surveillance was used in the investigation and, if so . . . the details of such surveillance.” Mindful of the “heavy obligation resting upon us,” Mr. Acheson made specific the breadth of the investigation in a communication to the Commissioner of Narcotics:

“It is essential that we provide the Department of Justice with reliable accurate information, so that a reliable and accurate evaluation of the prosecution can be made by that Department. A corollary of this is that your Bureau’s inquiry into the circumstances of each of these cases must be penetrating and must go back to the supervisors and agents familiar with the cases. In some cases evidence may have been turned over to your investigators by other Federal, state or local enforcement agencies, and in such case the inquiry must go to those sources of information.”

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In turn, the Commissioner of Narcotics made inquiry of each district office in the Federal Bureau of Narcotics as to the use of electronic surveillance equipment.

On December 30, 1966, John G. Evans, District Supervisor for District No. 6, whose geographical jurisdiction embraces both Atlantic and Columbus, Georgia, informed Narcotics Commissioner Giordano of the following:

- "1. On December 18, 1965, at Columbus, Georgia \* \* \* a 'bugging' device was installed by narcotics agents on an Avis Rent-a-Car prior to its rental to Jean Nebbia and Samuel Desist after their arrival at Columbus, Georgia, from New York by plane. \* \* \* No information was obtained, however, due to apparent malfunctions and static interference.

There were no other instances in this District in which 'bugging' equipment was used which involved trespass.

- "2. There were no instances in this District during the period January 1963 to date in which 'bugging' equipment was used which did not involve trespass.

\* \* \*

- "4. There were no instances in this District during the period January 1964 to date in which wire taps were placed, or participated in, by narcotic agents."

On January 19, 1967, Deputy Commissioner of Narcotics, George H. Gaffney, made a written report to Assistant Attorney General Fred M. Vinson, Jr., concerning the "electronic surveillance \* \* \* used in the investigation of Jean Nebbia, Samuel Desist, et al. and \* \* \* the details of such surveillance." The report contained the following:

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- “(a) On two separate occasions, and at two different locations, electronic surveillance was employed during this investigation. In one instance, a device was used to record conversations in a hotel room, and in the other case, to monitor conversations in a rented automobile.
- (b) In both instances, the electronic surveillance consisted of utilizing eavesdropping devices *and not wire tapping equipment.*
- \* \* \*

- (d) On the first occasion, on December 14, 1965, narcotics agents secured room 162 of the Waldorf-Astoria Hotel, New York, which was adjoining room 1600 occupied by Jean Nebbia. A narcotic agent placed a Shure Brothers microphone (Model MC-115) at the bottom of the connecting door between rooms 1600 and 1602. The microphone was placed on the side of the door located in room 1602 occupied by the agents. No physical penetration was made into the room occupied by Jean Nebbia. This microphone was connected to a Concord tape recorder, and all sounds coming under the door from room 1600 were recorded.

In the other instance, on December 18, 1965, at Columbus, Georgia, after it was learned that Jean Nebbia and Samuel Desist had made arrangements to rent an automobile from Avis Rent-A-Car, narcotic agents placed a radio transmitter in an Avis car, which was subsequently rented to Nebbia. No physical trespass was made into the car during the tenure of rental by Nebbia.

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"(e) In the first instance, conversations by Jean Nebbia were monitored by a narcotic agent, recordings were made, and reports were prepared.

In the second instance, the radio device in the rented car did not function properly; no conversations were intelligible, and no recordings were made. Accordingly, no notes were taken, no recordings were made and no reports were prepared.

• • •

"(h) The information in the first instance was furnished to the United States Attorney. Since nothing was gained as a result of the second incident, no other Federal agency was advised of the attempted eavesdropping."

*Testimony of Activities at the Black Angus Motel*

20. The Court finds the testimony of Agents Kiere, Benjamin, Waters, Matuozi and Selvaggi to be forthright and persuasive. (Findings of fact 13-18.) It is neither damaged nor diluted by the testimony of Oscar Kennington and Charles B. Brown.

The Court has carefully appraised the testimony of these two defense witnesses, considering its nature and substance, its consistency and contradictions, the witnesses' age, demeanor and ability to recollect past events. Viewed most charitably, this testimony does not rise to the level of credible evidence.

*A. The Testimony of Oscar H. Kennington*

Oscar H. Kennington, a 60 year old former traveling salesman for headache powder and beer, was, in December,

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1965, the day manager of the Black Angus Motel in Columbus, Georgia. His testimony concerning a purported overheard conversation on Monday, December 20, 1965, was marked by confusion, as he himself admitted, by an inability to accurately recall the events, the recurrent need to refresh his recollection, and by inconsistencies with his own prior written statement given only the day before.

Kennington testified that during the afternoon of Monday, December 20, 1965, he was invited to the agents' motel room to observe the seized narcotics, and "was thrilled over the stuff, I mean over putting my hand over all that much—." He then described a conversation he purportedly had with a person in the room whom he was unable to identify. In response to Kennington's inquiry as to how the narcotics were smuggled into the United States, this unidentified person allegedly said: "It was brought in in a deep freeze, in the walls of a deep freeze, and on the way down from Atlantic, we kept in touch with him through conversation . . . ." Apparently unsatisfied with the answer, counsel for the defendants attempted to refresh Kennington's recollection. In response, Kennington denied that anything was said about a radio transmitter in a car. When Kennington was shown his prior written statement given the day before to John G. (Steve) Broady, the defendants' investigator, he concluded, after considerable vacillation by saying, "I assume it was a radio transmitter." When asked whether his prior written statement refreshed his recollection Kennington twice responded only that it was refreshed to the extent of the agents having said they followed them. He concluded with the statement: "Well, the only thing I could say that they said they got a lot of information following them around, and that is as definite as



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I can speak.”<sup>7</sup> A portion of Kennington’s prior statement which was inconsistent with his testimony was then read into the record.

When Kennington resumed the stand after the luncheon recess, he stated that he wished to “change” one item of his earlier testimony. After giving several different versions of his prior testimony and the desired “change”, he finally testified: “I heard them say they had a transmitter in the car, but now they were not talking to me directly, sir.” This was in contradiction to his morning testimony specifically denying that the agents had stated they had a transmitter in the car. When questioned by the Court, Kennington testified that he specifically heard mention of the word radio transmitter and attempted to explain the inconsistency by stating, “Well, I am a little confused, sir.”

The accuracy and truthfulness of Kennington’s testimony are further clouded by his testimony on both direct and cross-examination that he saw Desist and checked him out of the motel on Monday, December 20. This was a physical impossibility since Desist was observed taking a Pan American flight from Paris, France, at 9:50 p.m. the previous evening, Sunday, December 19, at Kennedy International Airport in New York.

*B. The Testimony of Charles B. Brown*

Similar inaccuracies and confusion characterized the testimony of Charles B. Brown. Brown, a 66 year old, former tugboat and steamboat captain, was the night manager of the Black Angus Motel in December, 1965.

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<sup>7</sup> P. 99, transcript of July 18, 1967.

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A portion of Brown's testimony related to an incident in December, 1965, when he attempted to permit the narcotics agents to overhear on an extension a telephone call Desist received while at the Black Angus. Brown initially testified the incident occurred on Sunday evening, December 19, after he came on duty at 7:00 p.m. On cross-examination he fixed the time as between 7:00 and 9:30 p.m., Sunday evening, December 19. On further cross-examination he retracted his prior testimony and testified that this telephone incident occurred on Sunday morning, December 19. When questioned by the Court, he admitted that he could not recall when the incident took place. However, after being shown his prior written statement, a portion of which was read into the record, he testified in conformity with it that the incident occurred on Sunday evening at 8 o'clock.

In addition to Brown's confusion as to date, it is clear that Agent Waters did not overhear any portion of the conversation. Brown testified that the conversation had ended when he handed the receiver to the agent and that the agent held the receiver only a "few short seconds." He further testified that the conversation was in French. Agent Waters testified that he did not speak French.

Brown further testified that on Saturday, December 18, 1965, he gave Agent Waters the key to Desist's motel room. Although unable to observe the door of Desist's room, Brown testified that he observed the agents go and return to the building which contained it. Brown stated that the agents returned in "a minute and a half or two minutes" and told him only that "he is the man." Brown then twice denied that the agents had told him that they had examined Desist's room. Even after counsel attempted to refresh his

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recollection, Brown continued to deny that the agents had said anything about examining the contents of the room. It was only after Brown examined his prior written statement that he answered "yes" to a leading question as to whether the agents had said "they had examined the contents of the room."

Both Agents Waters and Selvaggi, when subpoenaed and questioned by defense counsel, denied having ever entered Desist's motel room. In view of Brown's inability to observe the agent enter the room, and the unreliable nature of his testimony, the Court credits the testimony of Agents Water and Selvaggi, as well as Matuozzi, and finds that at no time did the agents of the Federal Bureau of Narcotics enter Desist's motel room.

Nor does Brown's vague testimony that while occupied with other duties, he overheard a conversation that the agents "could hear from one car to the other" support any finding contrary to those set forth above.

The credibility of Brown's testimony is open to further question in view of the following facts. Brown initially refused to come to New York to testify at the trial at the request of the Government, stating: "I would not come to New York because I had been there as much as I ever cared to go."<sup>8</sup> Notwithstanding this reluctance, he did come to New York to testify before this Court. Although Brown claimed that the defendants told him nothing about the hearing, he explained that he was ultimately persuaded to appear because he was told "I should come as an American citizen and tell the truth." The defendants did, however, pay Brown's plane fare, hotel bills, meals and his

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<sup>8</sup> P. 47, transcript of July 18, 1967.

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daily earnings which he claimed to be \$50 per day as a self-employed insurance salesman for his 4-day stay in New York.

The unreliable nature of the testimony of the witnesses Kennington and Brown is in sharp contrast to the clear and unequivocal testimony of Agents Kiere, Benjamin, Matuzozzi and Selvaggi, all of whom are law enforcement officers of long experience and standing. Upon the Court's assessment of the entire testimony, it credits the testimony of the agents and rejects that of Kennington and Brown.

**CONCLUSIONS OF LAW**

1. Pursuant to the mandates of the United States Court of Appeals, dated May 29 and June 14, 1967, this Court has held hearings on the issues set forth therein. Defendants were afforded a full and complete opportunity to present their evidence, with the way prepared by four conferences before and during the hearings, defendants' burden lightened by numerous adjournments, their rights protected by the Government's production of twelve requested witnesses—in sum, a record spanning two months, comprising 813 pages of transcript.

2. The Court has analyzed the contents of the conversations relating to the defendants Frank Dioguardi overheard by the Casa Maria-Dorey surveillance (GX 1-12) and determined that they had no relevance to any of the evidence introduced at the trial or the conviction of any of the defendants.

3. Since nothing was overheard on the electronic device in the rented Avis automobile, it had no relevance to any of the evidence introduced at the trial or to the conviction of any of the defendants. The mere fact that an unsuccessful installation was made is not determinative.

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4. The written statements of Oscar Kennington and Charles Brown prepared by defendants' investigator John G. (Steve) Broady prior to the hearings were not given any independent probative value apart from the witnesses' sworn testimony at the post-trial hearing. *United States v. Allied Stevedoring Corp.*, 241 F. 2d 925, 933 (2d Cir. 1957). The decision of the Second Circuit in *United States v. Desisto*, 329 F. 2d 929 (1964) does not require a contrary conclusion.

5. The defendants have failed to carry their burden of showing that any governmental personnel engaged in any other electronic eavesdropping related to this case. The defendants have failed to demonstrate that any of the evidence used against them at the trial was tainted by any invasion of their constitutional rights. *Nardone v. United States*, 308 U. S. 338, 341-42 (1939); *United States v. Morin*, Docket No. 29786 (2d Cir., June 1, 1967) slip opinion p. 2392; *Addison v. United States*, 317 F. 2d 808, 812 (5th Cir. 1963), *cert. denied*, 376 U. S. 905 (1964); *United States v. Coplon*, 185 F. 2d 629, 638 (2d Cir. 1950), *cert. denied*, 342 U. S. 920 (1952); *United States v. Goldstein*, 120 F. 2d 485, 488 (2d Cir. 1942), *aff'd*, 316 U. S. 114 (1942).

Both the Second Circuit and the Supreme Court ruled in *Lawn v. United States*, 355 U. S. 339 (1958), 232 F. 2d 589, 594 (2d Cir. 1956), *aff'g* 116 F. R. D. 268 (S. D. N. Y. 1954) (where there had been an admitted invasion of the defendant's rights by way of violating the privilege against self-incrimination, which resulted in dismissal of a first indictment) that hearings were not necessary and that the affidavits of various government officials were of sufficient solidity to permit a ruling that the evidence actually used against the defendant was untainted.



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6. There was no relation between the Government's use of electronic equipment as described in findings of fact 1 through 19 and the trial and conviction of any of the defendants. Other than the incidents referred to therein, there was no electronic eavesdropping of any kind, by any member of any governmental agency which in any way related to these defendants.

7. The defendants have established no valid reason for a continuance of the hearings before this Court.

Dated: New York, N. Y.

August 30, 1967.

EDMUND L. PALMIERI  
U.S.D.J.

## APPENDIX C

### Judgment

#### UNITED STATES COURT OF APPEALS

#### FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of October, one thousand nine hundred and sixty-seven.

Present:-

HON. HAROLD R. MEDINA,  
HON. ROBERT P. ANDERSON,  
HON. WILFRED FEINBERG,  
*Circuit Judges.*

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HERMAN CONDER,

Defendant,

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC,  
JEAN NEBBIA and ANTHONY SUTERA,

Defendants-Appellants.

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Appeal from the United States District Court for the Southern District of New York.

*Appendix C*

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

It is further ordered, adjudged and decreed that the motion to inspect tape recordings and for other and further relief be and it hereby is denied.

A. DANIEL FUSARI  
Clerk

## APPENDIX D

### Relevant Statutes

#### Title 21 United States Code:

§173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is

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summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

§ 174. Same; penalty; evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and in addition may be fined not more than \$20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

F.R.C.P. RULE 28(b)

"(b) *Interpreters.* The Court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the Court may direct."



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# In the Supreme Court of the United States

OCTOBER TERM, 1967

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SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE  
LEFRANC, JEAN NEBBIA, AND ANTHONY SUTERA,  
PETITIONERS

v.

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINION BELOW

The opinion of the court of appeals is reported at 384 F. 2d 889 (Pet. App. A pp. 1a-32a), and the opinion of the district court following a remand for consideration of an issue involving electronic eavesdropping (Pet. App. B pp. 33a-58a), is not yet reported.

## JURISDICTION

The judgment of the court of appeals was entered on October 13, 1967. The time within which to file a petition for a writ of certiorari was extended by Mr. Justice Harlan to and including December 12, 1967, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the standard announced in *Katz v. United States*, No. 35, this Term, decided December 18, 1967, should be applied to cases then pending on appeal.

2. Whether, under the applicable law prior to the time of the *Katz* decision, the district court properly admitted evidence of conversations which were overheard without a physical trespass by placing a microphone next to the crack beneath a doorway separating two hotel rooms.

3. Whether the evidence was sufficient to support the finding of the district court, after a hearing on remand, that trespassory eavesdropping disclosed by the government had produced no information relevant to any of the evidence introduced against petitioners at trial.

## STATEMENT

Petitioners were convicted by a jury, in the United States District Court for the Southern District of New York, under an indictment charging that they and one Herman Conder<sup>1</sup> conspired to import narcotic drugs from France and to distribute them in the United States, in violation of 21 U.S.C. 173 and 174. On August 30, 1966, petitioner Desist was sentenced to imprisonment for a term of eighteen years, petitioner Dioguardi for fifteen years, petitioner LeFranc for twenty years, petitioner Nebbia for twenty years, and petitioner Sutera for ten years. The court of appeals affirmed.

<sup>1</sup> The case against Conder was severed prior to trial.

1. The evidence at trial, which is not now in issue, showed that in July 1965 petitioner Desist, a retired United States Army Major living in Orleans, France, offered \$10,000 to Herman Conder, a warrant officer at a nearby Army base who was about to be reassigned to Fort Benning, Georgia, if Conder would ship a used food freezer to the United States as part of his household effects. Conder agreed, and Desist delivered to Conder's residence a used freezer in which he had secreted 209 pounds of pure heroin. In late November, after the freezer had been delivered to the house trailer Conder had rented at Fort Benning, Conder wrote a letter to Desist informing him that the freezer had arrived.

On the evening of December 16, Desist and petitioner Nebbia, a French national, both of whom had flown to New York from Paris, met in Nebbia's room in the Waldorf-Astoria Hotel in Manhattan and discussed plans for picking up the heroin in Georgia that weekend. Desist told Nebbia that he first had to fly to Rochester to see "the boss," but would then proceed to Columbus, Georgia, and meet him at a motel. The following afternoon, petitioner LeFranc, also a French national, met Nebbia in the same hotel room, told him to rent a car when he arrived in Columbus the next day, and said that he would wait in a Columbus motel while Nebbia would "take care of things."

That evening, in a Manhattan bar, LeFranc met with the potential buyers of the narcotics, petitioners Dioguardi and Sutera, who had flown to New York from Miami earlier in the day and registered under false names at a Manhattan motel. LeFranc stated



that he would proceed to Georgia the next day with his "friend" to pick up the "merchandise" from his friend's "contact," and would then telephone Dioguardi and Sutera in Miami to arrange for a transfer of the "merchandise" to them. Sutera proposed that he and Dioguardi accompany LeFranc to Georgia to save him the extra trip to Miami, but LeFranc insisted that the matter be conducted as he had proposed.

That same evening, Desist informed Conder in Columbus that two Frenchmen would pick up the contents of the freezer the following day. However, when Nebbia and LeFranc arrived in Columbus, they surmised that they were being followed and decided to postpone the pickup for several more days. They drove back to Atlanta and then flew to New York, where they were arrested the next morning. At about the same time, Conder was arrested in Columbus and the cache of narcotics was seized.

2. Prior to trial, the government informed the district court and counsel for the defense that federal agents had used an electronic device to listen to conversations which had taken place in Nebbia's room in the Waldorf-Astoria Hotel, and suggested that a hearing be held to resolve any question as to the legality of the agents' conduct (R. 3156-3158). A three-day hearing was held on the issue. At the instance of the district court, the proceedings were, at one point, moved to the room of the Waldorf-Astoria Hotel from which the surveillance had been conducted, and the eavesdropping equipment was reinstalled by the agents in precisely the same manner as it had been

at the time of the surveillance (R. 3156-3159, 3206-3226):

The evidence adduced at the hearing showed that on December 11, 1965, petitioner Nebbia was assigned room 1602 at the Waldorf-Astoria Hotel (R. 3447, 3449-3450, 3468-3469). Three days later, on December 14, federal narcotics agents requested a room on the same floor as close as possible to Nebbia's, and were given room 1600 (R. 3427-3434, 3505-3507). Upon entering that room, the agents noted a door in the wall separating room 1600 from room 1602. One agent, Kiere, opened the door and found a second door immediately behind it (R. 3438, 3510). Another agent, Smith, placed his ear momentarily against the second door, heard nothing, then closed the first door (R. 3511-3512, 3525, 3527-3528).<sup>2</sup>

Later that afternoon, Agent Durham of the Bureau of Narcotics arrived at room 1600 with a tape recorder and other electronic equipment (R. 3392-3395, 3423, 3430). Kiere pointed out the doorway leading to room 1602, and stated that there was a second door behind the first (R. 3415-3417). Durham proceeded to lean a small microphone against the base of the door in room 1600 with its face tilted toward the three-eighth inch space between the bottom of the door and the top of the door sill (R. 3417-3420). No part of the microphone or any other apparatus extended into or under the first door (R. 3419, 3441). Durham fixed the microphone in place with adhesive tape, then, in order to minimize its sensitivity to any sounds

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<sup>2</sup> There is no evidence in the record to suggest that the first door was ever opened by the agents again.

in the agents' room, placed a bath towel over the microphone along the clearance space between the door (R. 3211-3213; Gov. Exs. 3, 4). Durham ran a cable from the microphone into the bathroom in the agents' room, where it was plugged into an amplifier which was connected to a tape recorder (R. 3210-3211, 3218; Gov. Exs. 1, 2). The tape recorder could be operated manually, or by a voice actuated switch which would turn on the recorder whenever the sounds entering the microphone reached a certain level (R. 3223, 3225). Any matter being recorded could be heard simultaneously on a speaker (R. 3215, 3222).

Thereafter, from the afternoon of December 14 through December 18, Agent Kiere, who was fluent in French, operated the equipment manually to overhear and record conversations which took place in Nebbia's room, including the conversation between Nebbia and Desist on December 16 and the conversation between Nebbia and LeFranc on December 17 (R. 3214-3216, 3225-3226). During the surveillance, Nebbia's room was never entered by the agents, the second door was never opened, and no equipment was attached to that door (R. 3404-3405, 3424, 3430-3433, 3438, 3441-3442, 3478, 3493, 3514, 3528-3529, 3748, 3756-3758, 3771, 3776).

At the conclusion of the hearing, the district court found that no physical trespass was involved in the eavesdropping, and denied the defense motion to suppress the evidence thereby obtained (R. 3778-3782). Evidence of the conversations was thereafter admitted at trial (R. 371-378, 553-627).

3. After petitioners had been convicted and while the case was pending on appeal, the government advised the court of appeals that a review of the case had disclosed two instances of trespassory electronic surveillance, one involving petitioner Dioguardi in Miami in 1962, and one involving petitioner Nebbia in Columbus on December 18, 1965 (R. 4777-4778). Neither instance; the government stated, produced relevant information (R. 4778). The court of appeals remanded the case to the district court for a hearing on the nature and effect of the eavesdropping on those two occasions, and any other such occasion (R. 4930, 4945).

On remand, the district court held extensive evidentiary hearings—covering over 800 pages of transcript (R. 3912-4737)—at which testimony was heard from fourteen witnesses, all but two of whom were government agents. In addition, logs of the Miami conversations were made available to the court, and the relevant portions were introduced in evidence (see Pet. App. B pp. 36a, 44a-45a). Documents involved in the government's internal review of the eavesdropping were furnished to the court and the defense (see Pet. App. B pp. 47a-51a).<sup>3</sup>

The evidence presented at the hearing showed that in 1962 the F.B.I. installed an electronic eavesdropping device by trespass in a restaurant near Miami, Florida, in connection with an investigation of a per-

<sup>3</sup> The district court declined to reopen inquiry into the Waldorf-Astoria eavesdropping since the issue had been explored thoroughly prior to and during trial (see Pet. App. B pp. 37a-38a).



son having no involvement with the present case. In operating the device, agents of the F.B.I. heard several conversations in which petitioner Dioguardi was identified as a participant. None of the conversations had any bearing on the present case (see Pet. App. B pp. 41a-45a). The evidence also showed that in Columbus, Georgia, on December 18, 1965, federal narcotics agents installed an electronic eavesdropping device in an automobile belonging to a car rental agency, and that later that day the automobile was rented to petitioner Nebbia. The listening device malfunctioned, however, and produced only static and unintelligible noises. The agents abandoned attempts to use it, and proceeded only with visual surveillance (see Pet. App. B pp. 45a-46a).

After hearing all of the evidence, the district court, in a detailed opinion, concluded that the Miami and Columbus incidents "had no relevance to any of the evidence introduced at the trial or to the conviction of any of the defendants" (Pet. App. B p. 56a). It further held that the defendants had failed to establish that there was "any other electronic eavesdropping related to this case" or that "any of the evidence used against them at the trial was tainted by any invasion of their constitutional rights" (Pet. App. B p. 57a).<sup>4</sup>

<sup>4</sup> As to the testimony of two defense witnesses through whom the defense sought to establish various investigative improprieties by federal agents in Columbus, the district court found that "[v]iewed most charitably, this testimony does not rise to the level of credible evidence" (Pet. App. B p. 51a).

<sup>5</sup> The court also found that the office of the United States Attorney for the Southern District of New York had no knowledge of either the Miami or Columbus incidents at the time of trial (Pet. App. B pp. 45a-46a).



## ARGUMENT

In *Katz v. United States*, No. 35, this Term, decided December 18, 1967, this Court held that where a person conducting a conversation which he "seeks to preserve as private" has "justifiably relied" upon the privacy afforded by a public telephone booth, eavesdropping by electronic means upon that conversation without a warrant, even where no physical trespass is involved, constitutes an unreasonable search and seizure within the meaning of the Fourth Amendment and the evidence so obtained may not be used at trial. If the principle announced in *Katz* is to be applied to cases pending on appeal on the date of that decision, the affirmance of petitioners' convictions cannot stand.\* We urge, however, that, under the criteria announced by this Court in weighing the propriety of retrospective application of newly announced constitutional standards, application of the *Katz* holding to prior cases is not warranted.

In recent cases discussing the possible retroactivity or non-retroactivity of constitutional rules of criminal law, this Court has stressed the necessity of assaying the particular situation before it by considering the purpose of the new standards, the reliance of law enforcement authorities upon the old standards, and the effect upon the administration of justice of a retroactive application of the new standards. *Stovall v. Denno*, 388 U.S. 293, 297; *Johnson v. New Jersey*, 384 U.S. 719, 727; *Tehan v. Shott*, 382 U.S. 406, 413; *Linkletter v. Walker*, 381 U.S. 618, 636.

\* We note, however, that no rights of petitioners Dioguardi and Sutera were violated by the overhearing.

The reliance of law enforcement authorities upon prior law in this area is apparent. The distinction between an electronic eavesdropping which does not involve a physical trespass into a constitutionally protected area, and an electronic eavesdropping which does involve a trespass, was drawn by this Court in *Goldman v. United States*, 316 U.S. 129, and *Silverman v. United States*, 365 U.S. 505. See *Lopez v. United States*, 373 U.S. 427, 438-439. The lower courts have been uniform in applying that distinction. Only a week prior to the agents' installation of the eavesdropping equipment in this case, this Court denied a petition for a writ of certiorari to review a Second Circuit decision affirming, on the basis of *Goldman*, the propriety of a virtually identical installation by the same narcotics agent. *United States v. Pardo-Bolland*, 348 F. 2d 316, certiorari denied, 382 U.S. 944 (December 6, 1965). In that case, Agent Durham had taped a small microphone against the clearance space beneath a door separating two hotel rooms, just as he later did in this case. In each instance, care was taken that there was no penetration into or under the door; the microphone was simply placed so as to pick up the sounds coming under the door. The agents certainly had no cause to anticipate that the same type of installation found constitutionally permissible in the *Pardo-Bolland* case might not be held permissible when employed a short time later. However appropriate the recent abandonment of the trespass distinction, the "operative fact" (*Linkletter v. Walker*, 381 U.S. 618, 636)

is that the agents' conduct was not an intentional evasion of a known constitutional standard.<sup>7</sup>

The purpose to be served by the new standard announced in *Katz* is to deter law enforcement agents from electronically monitoring conversations which a subject seeks to preserve as private and reasonably assumes to be private, except where judicial sanction is first secured. The deterrent aspect of the *Katz* rule can only affect situations arising after that decision. Retroactive application of the *Katz* rule can not change the fact that law enforcement officers, relying on *Goldman*, have in the past used non-trespassory devices to overhear conversations. Moreover, the type of evidence obtained here is of the highest probative value. This is not a situation where infringement of a right—such as denial of the right to counsel at a trial—can be said to have involved “the integrity of the truth-determining process at trial”. *Stovall v. Denno*, 388 U.S. 293, 298.<sup>8</sup>

<sup>7</sup> In this respect, the situation presented here is far more compelling than that which faced this Court in *Linkletter v. Walker*, *supra*. See *Johnson v. New Jersey*, 384 U.S. 719, 731; *Tehan v. Shott*, 382 U.S. 406, 417. There the conduct of the state agents was known to be constitutionally forbidden at the time it occurred, and the only question was whether the exclusionary rule announced in *Mapp v. Ohio*, 367 U.S. 643, was to be given retroactive effect. Although the sole reliance of the state authorities was not upon the propriety of the means of obtaining evidence, but upon the admissibility of evidence unlawfully obtained, retroactive application of the rule was still denied.

<sup>8</sup> In the *Stovall* case, the standard announced in *United States v. Wade*, 388 U.S. 218, was denied retroactive application despite the fact that a defense counsel's presence at a lineup may permit a more meaningful examination at trial as to the basis and accuracy of a witness' courtroom identification. Here, the argument against retroactive application is even more persuasive.

While, in volume, the effect upon the administration of justice of a retroactive application of the standard announced in *Katz* would not be of the same dimensions as that discussed in *Stovall* or in *Johnson v. New Jersey*, 384 U.S. 719, electronic surveillance has played a role in cases of major significance.<sup>9</sup> This case dramatically illustrates the point. The quantity of pure heroin seized exceeded 200 pounds,—acknowledged by petitioners to be the largest cache ever captured in this country (Pet. p. 3). The *Pardo-Bolland* case, noted at page 10 above, involved approximately 136 pounds of heroin (see 348 F. 2d at 318).

Moreover, in denying retroactive application, there is no reason to distinguish between convictions which were final on the date of the *Katz* decision and those which were then still in the appellate process. While in some instances a newly announced rule was applied to cases then pending on appeal (see *Linkletter v. Walker*, 381 U.S. 618, 622 n. 4; *Tehan v. Shott*, 382 U.S. 406, 409 n. 3),<sup>10</sup> this Court later emphasized that

<sup>9</sup> The difficulty in obtaining evidence by the more common means against major figures in the organized crime field, and the corresponding importance of electronic surveillance in such cases, has been noted by the President's Commission on Law Enforcement and Administration of Justice in its report entitled *The Challenge of Crime in a Free Society*, pages 198–199, 201–203.

<sup>10</sup> In this respect, the fact that *Mapp* involved the Fourth Amendment, as did *Katz*, is not determinative or even relevant. As this Court has emphasized in discussing retroactivity generally (*Stovall v. Denno*, *supra*, at 297; *Johnson v. New Jersey*, *supra*, at 728):

[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional

such applications were made "without discussion" and before the general problem was actively considered. *Johnson v. New Jersey*, 384 U.S. 719, 732; see Schaeffer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. Law Rev. 631, 644-646 (1967). Since those decisions, this Court has held that no distinction is justified between convictions which were final at the time of the pertinent opinion and convictions which were then at various stages of trial and direct review. *Johnson v. New Jersey*, *supra*, at 733; *Stovall v. Denno*, 388 U.S. 293, 300-301.

2. Under the law applicable prior to the time of the *Katz* decision, the district court did not err in admitting evidence of the monitored conversations. After a thorough evidentiary hearing during which the electronic equipment was displayed, reinstalled, and explained, the court found that the monitoring of the hotel room did not involve a trespass (R. 3778-3782). There was thus no reason to exclude the evidence of the conversations.<sup>11</sup>

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rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved.

<sup>11</sup> Petitioners asserted for the first time in the court of appeals, and now assert before this Court, that by placing an ordinary microphone next to the clearance space beneath one of two doors separated by an airspace there is created, in effect, a parabolic microphone (Pet. pp. 21-22). The assertion has no basis in physics, no foundation in the record, and no relevance in law. Their more general assertion, that such a structure containing an airspace is designed to enhance privacy, and yet was utilized instead as a means of invading privacy (Pet. pp. 23-25), similarly lacks evidentiary support



Petitioners, however, attack the district court's finding of fact. They contend that, contrary to all the testimony at the pretrial hearing, the microphone must have been located in petitioner Nebbia's room rather than the agents' room, because, if located in the latter, the microphone would have picked up sounds of the agents using their short wave radio, telephone, typewriter, and tape playback mechanism, yet no "perceptible amount" of such sounds was recorded by the sound-actuated tape recorder. (Pet. pp. 31-33). The contention is fully answered by the record. The microphone, which was placed next to the floor on the agents' side of the first door, was shielded from sounds originating in the agents' room both by a mask of adhesive tape and by a folded bath towel (R. 3211-3213; Gov. Ex. 3, 4). Moreover, instead of being operated by the sound-actuated switch, the recorder was operated manually by Agent Kiere (R. 658-660, 668-670, 3215-3216, 3225-3226). The short-wave radio, typewriter, and tape playback mechanism were not used while a conversation was being recorded (R. 693, 700-704, 857-858, 930-932); in the few instances where the telephone was used during a recording the tape con-

as well as relevance. Moreover, the *Pardo-Bolland* case, in which there was a single door between the two rooms, demonstrates the immateriality of an airspace to the functioning of such equipment as was here employed. In any event, certainly there is no reason to accord an airspace separating two doors any more legal significance than an airspace between the studs separating the exterior surfaces of a wall. See *Goldman v. United States*, 316 U.S. 129.

tained such noises (see e.g. R. 293-296). There is thus no reason to question the finding of the district court.<sup>12</sup>

3. There is no merit to petitioners' allegation that the evidence at the hearing on remand was insufficient to support the district court's finding that no information relating to this case was obtained from any trespassory electronic surveillance (Pet. p. 7). The testimony of the defense witness Kennington, on which petitioners rely, was confused, uncertain and contradictory. Although he had stated at one point that he had overheard narcotics agents in Columbus say they had used a radio transmitter in a car to hear unspecified conversations, he denied this at another point of the hearings.<sup>13</sup> The district court concluded that, considering the substance of Kennington's testimony and his contradictions, demeanor, and general ability to recall past events, the testimony, "charitably" viewed, did not rise "to the level of credible evidence" (Pet. App. B. p. 51a). The court expressly rejected Kennington's testimony in favor of the "clear and unequivocal" testimony of the government agents (Pet. App. B. p. 56a; see *id.* at pp. 40a-41a). This determination of credibility plainly does not call for review by this Court.

Petitioners' further claim that "despite the *apparent* thoroughness of the remand proceeding" they

<sup>12</sup> Petitioners' argument (Pet. pp. 35-38) concerning the President's policy directive of June 30, 1965, to which the government alluded in the *Schipani* case, affords no reason for excluding from evidence the hotel room conversations overheard in this case. As we have noted previously, the overhearing involved no impropriety under existing law.

<sup>13</sup> The district court's resumé of Kennington's vacillations and admitted confusion appears at Pet. App. B. pp. 51a-53a.

were "cut off from any real opportunity to probe the [government's] \* \* \* 'proof'" (Pet. p. 38), is totally unsupported. Petitioners were given several postponements in the hearing in order to conduct an independent investigation (R. 3923-3924, 3945, 3960-3963, 3972, 3981-3982, 4007-4008, 4199-4201, 4211-4212, 4229-4231, 4239-4242, 4369, 4377, 4379, 4581-4584), they were afforded access to the pertinent government records (see Pet. App. B. pp. 45a, 47a-51a), and they examined and cross-examined the government agents involved. In what way they were improperly "cut off" from legitimate inquiry is not specified."

#### CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,  
*Solicitor General.*

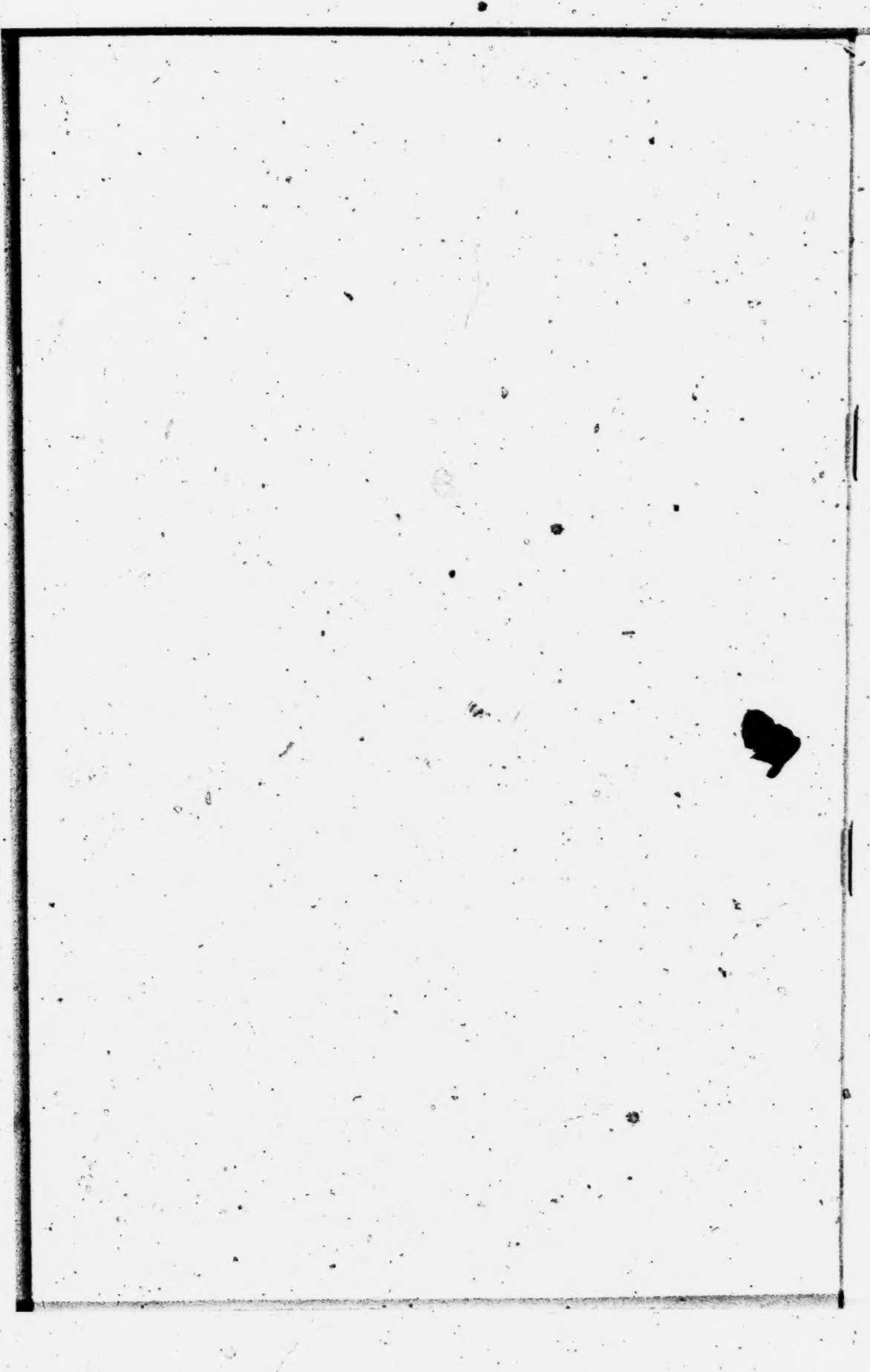
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JANUARY 1968.

<sup>14</sup> Petitioners have raised, but have not argued, several additional issues (Pet. 7-9). Each of these contentions has been adequately answered in the opinion of the court of appeals.







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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1968

No. **12**

**SAMUEL DESIST, FRANK DI GUARDI, JEAN CLAUDE  
LEFRANC, JEAN NEBBIA and ANTHONY SUTERA,**

*Petitioners,*

—against—

**UNITED STATES OF AMERICA,**

*Respondent.*

**On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit**

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**JOINT REPLY BRIEF FOR PETITIONERS**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1967

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**No. 909**

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SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC,  
JEAN NEBBIA and ANTHONY SUTERA,

*Petitioners,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

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**JOINT REPLY BRIEF FOR PETITIONERS**

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**Introductory**

The Brief in Opposition urges that *Katz v. United States*, No. 35, this Term, decided December 18, 1967 should not be applied to this case. The Government con-



cedes that "the principle announced in *Katz*" would preclude "affirmance of petitioners' convictions", but the Government states that "application of the *Katz* holding to prior cases is not warranted." Br. Opp. 9.

Our joint petition for certiorari herein was filed December 12, 1967, six days before this Court decided *Katz*. This reply brief affords the first occasion for us to brief the question of retroactivity of *Katz*.

### **Retroactivity of the *Katz* Decision**

The retroactivity question here has three aspects: (1) What does "retroactive" mean, *factually*, when *Katz* and our case are considered in juxtaposition? (2) What result does precedent favor? (3) What result does policy, which means *constitutionally just* policy, favor?

(1) Our joint petition for certiorari, as above mentioned, was already pending in this Court when *Katz* was decided. Exactly seven months before the Court below in our case rendered its decision affirming the narcotics convictions (October 13, 1967), that Court and all the world knew that this Court had granted certiorari in *Katz* (March 13, 1967). Another operative "constitutional fact" of interest here is that the non-trespassory electronic spying which this Court condemned in *Katz* took place a considerably longer time ago than the claimedly non-trespassory electronic spying in our case; the *Katz* eavesdropping took place in February 1965 (369 F. 2d at p. 131); the eavesdropping in our case took place in December 1965. Which Judge or which lawyer would relish the task of explaining to an intelligent layman exactly why an act of electronic snooping done in February 1965 stands constitutionally condemned, but an indicatedly much more obnoxious bit of electronic snooping done nearly ten months later may not be thus condemned, and that the reason

has to do with a dislike for "retroactivity"? Shall the present petitioners who were electronically spied upon nearly ten months after Charles Katz was, be denied constitutional protection because, through the vagaries of Court procedure, our case lost a race with *Katz* towards United States Supreme Court certiorari?

The ardor with which governmental prosecutors of late have been litigating and ratiocinating about the question of "retroactivity" in situations of this sort is generating a strange atmosphere of constitutional unreality, indeed of common sense unreality. We do not deny that when official prosecutors are confronted with a retroactivity ruling of this type inconvenience can result. But before simplistically moving to avert such inconvenience courts ought to take account of particular fact situations presented to them rather than to decree flat unvarying rules of prospectivity.

Our case is before this Court now; and, again, it was lodged in this Court before *Katz* was decided. Our case is not off somewhere in a "category" of which a merely statistical or abstract general view may be taken. And we might mention also that, from its active litigational inception in May 1966, when the pre-trial motions began, our case has expressly thrust forward the electronic eavesdrop issues, and has continued to do so at all subsequent stages. Thus, our case actively involved the electronic eavesdrop issue nearly a year before certiorari was granted in *Katz*.

(2) Precedent does not help the Government's position here. In fact, as we read the *Katz* decision itself the Court has apparently already indicated its view as to the retroactivity question; we refer to the Court's rejection in *Katz* of the Government's argument that because its agents relied on *Olmstead v. United States*, 277 U. S. 438 and

*Goldman v. United States*, 316 U. S. 129, the Court should retroactively validate their conduct. *Linkletter v. Walker*, 381 U. S. 618 held that the *Mapp* rule did not operate retrospectively upon cases finally decided prior to *Mapp*; that does not justify what the Government here seeks, because *Katz* was decided while our case was (is) still pending. *Tehan v. Shott*, 382 U. S. 406 laid down a similar rule as to the principle of *Griffin v. California*, 380 U. S. 609; therefore, *Tehan* no more than *Linkletter* justifies what the Government here seeks with respect to our case. *Johnson v. New Jersey*, 384 U. S. 719 held that the *Escobedo* and *Miranda* decisions were applicable only to cases in which trial began after the decisions were announced, and *Stovall v. Denno*, 388 U. S. 293 made the "lineup" rule of the *Wade* and *Gilbert* cases applicable only from the date of the decision in *Stovall*. *Johnson* and *Stovall*, then, do concededly apply rules of prospectivity which would prevent us from having the benefit of *Katz*, but the problems of just constitutional policy need to be considered, a topic which we take up in our next paragraph.\*

(3) Policy, just constitutional policy, strongly favors applying *Katz* "retroactively", in any event to this case. The Government emphasizes prosecutive inconvenience and that law enforcement officers have relied in good faith on pre-*Katz* decisions. Perhaps the first thing that should be mentioned is that electronic snooping is offensive to public morality and taste since it involves the odious busi-

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\* The *Stovall* rule, incidentally, is not being applied inflexibly; where a fundamental denial of due process has occurred in a pre-trial identification procedure "retroactive" relief may be granted. *People v. Ballott*, 20 N. Y. 2d 600 (1967). Nor, apparently, is this Court's *Johnson* decision preclusive where a claim of involuntary confession is involved. 384 U. S. at 730.

ness of secretly invading personal privacy, and if social values are to be deemed to be expressed or worthy of being expressed in the constitutional principles of law enforcement in a civilized modern country, it is entirely justifiable to say that electronic eavesdropping affects the plainest constitutional decencies and indeed in a large sense affects "the integrity of the truth-determining process". *Stovall v. Denno*, 388 U. S. 293, 298.

The concern of just constitutional policy should not be primarily with governmental administrative convenience, or even with serious burdensomeness in performance of governmental tasks. The foremost concern should be with *rightness* of governmental conduct. *Katz* says, in effect, that non-trespassory electronic snooping is constitutionally evil because it attacks the constitutional good of individual privacy which *Katz* says the Fourth Amendment protects in such an encounter. The Government does not even claim in this case that there are more than a few cases in which police would be disappointed if *Katz* is made retroactive (Br. Opp. 12). The Government's theme is that police should be allowed to retain the victories they have won through non-trespassory electronic eavesdropping, first because the police thought they were acting lawfully, and second because the cases have been big, important cases. Our answer to the first of these arguments is that police have had plenty of cause for some years now to feel unsure about the continuing "lawfulness" of such non-trespassory snooping; conspicuous public agitation, on many social and institutional levels, has been going on concerning this problem for several years. Another answer is that it is unseemly as a matter of constitutional values and public morality, to make the victim rather than the wrongdoer bear the impact of the choices which this Court may make as to prospectivity versus retroactivity in a case of the present kind. Still another

answer may be made in terms of the familiar idea of deterrence of wrongful police conduct; that is, it is cynical to let policemen go on using a morally and legally questionable method of investigation down to the last possible moment until a Court of final jurisdiction decides to stop them. Electronic snooping is *par excellence* the sort of police activity which should not retrospectively condoned in this manner which *undeterred* police zealots are constantly counting on and piously go on rationalizing about. As for the second branch of the Government's theme above mentioned, that police should be allowed to keep a major triumph like the convictions in this case, such reasoning would allow them to keep any such triumph no matter by what monstrous constitutional violations obtained; it is one of those arguments which proves too much.

We respectfully suggest that the *Katz*-retroactivity issue presented by our case is too important a constitutional issue to be left to a ruling by way of an order denying certiorari, as the Government is here asking the Court to do. The issue should be briefed, argued and decided on the merits, through the granting of certiorari in this case.

**The Question Persists in any Event as to Whether  
the Electronic Eavesdropping in this Case  
Complied With Pre-Katz Standards.**

The Government in its Brief in Opposition (pp. 13-15) argues the issue which we have tendered in our joint petition as to whether the District Court correctly found that the Waldorf-Astoria electronic eavesdropping in our case complied with pre-*Katz* standards. It will be recalled that when the Court of Appeals remanded our case to the District Court for a hearing on electronic eavesdropping it expressly excluded the Waldorf-Astoria episode (on which petitioners' convictions depend) because there had been a pre-trial hearing on that episode. Our petition for cer-



tiorari contests the adequacy of that pre-trial hearing on numerous grounds, not limited to the issue of "trespass". The Court of Appeals should have granted us a remand as to the Waldorf-Astoria episode. There is too much in that episode which remains unsatisfying. Certiorari should be granted here if only for the purpose of remanding for a further hearing as to the Waldorf-Astoria eavesdropping. Indeed, without first resolving the issues we have raised as to the pre-Katz lawfulness of that eavesdropping, it is hard to see how the retroactivity question as to Katz can be decided either way for our case, because if we are right about the Waldorf-Astoria activity we should receive certiorari irrespective of Katz.

### CONCLUSION

**It is respectfully submitted that the joint petition for certiorari should be granted.\***

Respectfully submitted,

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\* At p. 13 of the joint petition for certiorari we stated that we expected to make a motion in this Court for permission to file nine copies of a special appendix or compilation of the pertinent record items on the electronic issues. Our clients are all in jail, and we have been unable to overcome thus far the financial difficulties of obtaining such an appendix or compilation, which would be a heavy expense. We apologize to the Court.



MAY 9 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 12

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC,  
JEAN NEBBIA and ANTHONY SUTERA,

*Petitioners,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF AND APPENDICES  
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IN THE  
**Supreme Court of the United States**

October Term, 1967

No. 909

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SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC,  
JEAN NEBBIA and ANTHONY SUTERA,

*Petitioners,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

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**JOINT BRIEF FOR PETITIONERS\***

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**Opinions Below**

The opinion of the Court of Appeals affirming the convictions of the petitioners is reported in 384 F. 2d 889. The

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\* Argument of this case was at first ordered to be accelerated, then argument was re-scheduled for the next Term. The Clerk advised counsel by letter of March 14, 1968 that the Chief Justice had approved a proposal that the case be presented on the basis of the record certified by the lower Court. Accordingly, petitioners have not printed an appendix in this Court under Rule 36; but see the appendices to this brief, *infra*. The certified record includes a miscellany of items relating to electronic eavesdropping; for clarity of reference to these items, we think it best to cite them in each instance *infra* by suitable descriptions rather than by bare "record" page references.

Also, we find in checking back on our copy of the listing by the Clerk of the Court below as to the contents of the certified record, that it is not clear whether all of the items in the record relating to electronic eavesdropping were actually included by that Clerk in the record as certified to this Court at the time of the filing of our petition for certiorari. Our belated recognition of this uncertainty as to the complete contents of the certified record is regretted; such uncertainty

opinion of the District Court after remand on issues of electronic eavesdropping is reported in 277 F. Supp. 690. Both of these opinions were printed as appendices to the joint petition for certiorari.

### Jurisdiction

The judgment of the Court of Appeals was entered on October 13, 1967 (Pet. Cert. App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The order granting certiorari is dated March 4, 1968.

### Questions Presented\*

Petitioners were convicted of narcotics conspiracy. The Government has fought throughout this case to vindicate

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probably would not have occurred but for the pressures of the former accelerated schedule herein and the fact that the Clerk of the Court below had the certified record transmitted to this Court in sealed packages whose contents we could not examine. We do know, and we assure the Court, that in ordering the certified record from the Clerk of the Court below we were absolutely explicit in requesting that each and every item in the file or record be certified. Promptly after serving and filing this brief we shall examine the certified record in the office of the Clerk of this Court, and if any record item cited in this brief is found to be not contained in the certified record, we shall move for supplemental certification or shall take whatever other step the Clerk may advise; we trust that the Government will not be inconvenienced in this regard because we assume that the Government has a complete file of this case.

It should be noted also that in including petitioner LeFranc on this brief *pro se*, we are adhering to the position stated in the joint petition for certiorari herein, pp. 1-2, fn.

\* Having in mind the requirement that the "Questions Presented" on which certiorari is granted control the substance of the "Questions Presented" in a brief on the merits, we must note that of necessity some re-wording of the questions must be done here because of the supervening decision in *Katz v. United States*, No. 35 this Term, which was decided after our petition for certiorari was filed and before it was granted.

its use of certain electronic eavesdropping (at the Waldorf Astoria Hotel in New York City) without which, concededly, the case could not have been developed in its present prosecutive framework. Now, since the decision in *Katz v. United States*, No. 35 this Term, whose principle the Government concedes would preclude affirmance of petitioners' convictions, the Government's effort to save the convictions is being concentrated on the contention that *Katz* should not be applied to prior cases. However, we contend that even if *Katz* does not "retroactively" apply to this case, the Waldorf-Astoria eavesdropping was unconstitutional by pre-*Katz* standards as to "trespassory" electronic "bugging"; and in any event there are questions as to the due process adequacy of the proceedings in both of the Courts below which resulted in findings that the Waldorf-Astoria bugging was not trespassory. Also, certain further conduct of the Government's representatives in this case took place which requires constitutional scrutiny both as to whether additional taint-productive eavesdropping was resorted to and as to whether the Narcotics Bureau Agents have thus far revealed the full truth on that subject as well as on the subject of the Waldorf-Astoria bugging; and, indeed, whether the United States Attorney's office has met its full constitutional obligation to cooperate in judicial exploration of those subjects; and whether, again, petitioners were afforded adequate due process adjudication in both of the Courts below as to such indicated further taint-productive eavesdropping especially in light of obstructive and evasive tactics of the Government's representatives. More systematically stated, the questions are:

1. Is the applying of the *Katz* principle to this case prevented by any policy of non-"retroactivity"?



2. Even if Question 1 is decided against petitioners, i.e., even if the Court holds that the *Katz* principle does not govern our case for some reason favoring "prospective" rather than "retroactive" application of *Katz*, should not the convictions nevertheless be vacated on the ground that the Waldorf Astoria bugging violated pre-*Katz* standards prohibiting "trespassory" or otherwise constitutionally forbidden physically penetrational or physically intrusive bugging? This question of the pre-*Katz* constitutionality of the Waldorf Astoria bugging needs to be considered on two factual alternatives presented by the record, *viz.*, either (a) that the Government's own description of how the Waldorf Astoria bugging was done from the physical or technological standpoint may be accepted as having been proved, or (b) that the Government's proofs concerning this should be rejected as probatively unsatisfactory. On either of these alternatives we urge that pre-*Katz* standards were violated. These two alternatives are amplified in the next two questions.

3. Accepting the Government's contention that the Waldorf Astoria bugging method used was the placing of a microphone at the bottom of a door inside the Agents' own room adjoining petitioner Nebbia's room, a procedure which the Government claims was patterned after and justified by that used in the pre-*Katz* case of *United States v. Pardo-Bolland*, 348 F. 2d 316 (C.A. 2, 1965), cert. denied 382 U.S. 944, 946, was not the instant Waldorf Astoria bugging decisively distinguishable in fact (and therefore in law) from that in *Pardo-Bolland*, (a) in that our case involved a double-door arrangement between adjoining hotel rooms whereas *Pardo-Bolland* involved a single-door barrier, so

that in our case there was actually a "trespassory" intrusion into the specially-provided (for added privacy) air space between the two doors, by reason of the admitted physical entry into that privacy-purposed air space by several of the Government's agents in preparing for the installation of the microphone; (b) also in that here the "bug", as a matter of incontestable technological fact, operated as a "parabolic mike" trespassorily operating upon, through and beyond the aforesaid air space; (c) also in that in our case the issue is expressly presented that the "bug" admittedly utilized the hotel electric current as its power source so that the common wiring system of the hotel, serving all the hotel's guests, was turned into a means for electronic spying; and (d) in that in our case the issue is expressly presented that the hotel management secretly connived with the Government to plant the Agents in the adjoining room desired by them for the electronic spying, thus betraying the trust of a hotel guest who relied on his host not to betray his privacy?

4. Question 3, above, posits that the Government's Agents told the truth about how they physically or technologically performed the Waldorf-Astoria bugging. But does not the record of the pre-trial hearing on this subject present grave questions as to the truthfulness of the Agents' testimony and the correctness of the trial Court's findings that the Waldorf Astoria bugging was done in the manner claimed by the Agents? And in view of further indications—which first emerged during the proceedings in the Court of Appeals—that the constitutionally required full and truthful disclosures of electronic spying in this case had not been and were not being willingly given by the Government,

does not the question of what the Agents actually did at the Waldorf Astoria become still more disturbing? And in that posture of the case before the Court of Appeals, does not the record present the following further grouping of questions: Should not the Court of Appeals have done more than it did to assist the petitioners in probing into the full facts of the electronic spying in this case? Petitioners having striven in the Court of Appeals over a period of several months (*via* a massive and numerous series of motions, etc. based on elaborately specific factual showings) to demonstrate that the Government was holding back relevant information about its electronic spying activities, the Government having at last reluctantly disgorged the information that two previously undisclosed trespassory buggings (in addition to the Waldorf-Astoria bug) had been perpetrated, and the Court of Appeals then having at last remanded the case for a hearing as to any electronic activity but expressly excluding from such remand the Waldorf-Astoria bug, should not the Court of Appeals have included in the remand a hearing on the Waldorf-Astoria bug as well? Was it justifiable to exclude the Waldorf-Astoria bug from the remand hearing solely because that issue had once been heard in the pre-trial hearing here involved? Was it constitutional, fair or rational to grant a remand for a new electronic eavesdrop hearing without including the Waldorf-Astoria bug, in the face of the revelations at last that the Government had so poor an appreciation of its own constitutional responsibilities of voluntary disclosure in this case, and above all in the face of our strongly-circumstantial demonstration in the Court of Appeals that the Narcotics Agents who testified at the pre-trial hearing concerning the technical methods of the Waldorf-

Astoria bug must almost surely have been testifying falsely, and that it was demonstrably a virtual technological certainty (*on the present record*) that the bug must have been of an outright trespassory character rather than of the "*Pardo-Bolland*" type?

5. Did both of the Courts below err in ruling that the Waldorf Astoria eavesdrop evidence was constitutionally admissible?

6. Aside from the Waldorf Astoria phase, were petitioners denied due process by the conduct of the Government and the rulings of both Courts below in regard to other electronic eavesdropping, the Government having belatedly admitted (at the appeal stage) two other trespassory buggings (which it claimed did not materially affect the convictions), the Court of Appeals having then remanded the case for a "full hearing" as to "these and other electronic eavesdrops of any kind which related to this case (except for the Waldorf monitoring \* \* \*)", the Government then having made what we contend was a grossly insufficient explanation and disclosure in the ensuing remand hearing, petitioners despite these handicaps having then gone on to adduce sworn direct testimony in the remand hearing that Narcotics Agents had boasted of a successful trespassory automobile bugging in Georgia which helped to break this case, the District Court in the remand hearing then having rejected this evidence of ours on grounds of credibility and on the basis of such rejection having relieved the Government of any further burden of explanation or of going forward (even though no Agent or anyone else took the stand to deny our proof that Agents

had boasted as aforesaid), and both of the Courts below having concluded that the remand proceeding was procedurally adequate and had produced no showing "that any of the evidence used against [petitioners] at the trial was tainted by any invasion of their constitutional rights"?

7. Should not the Waldorf Astoria eavesdrop proofs have been excluded from evidence in any event because of the very poor probative quality of the tape recordings, which were in the French language, pervasively garbled and gapped, unsatisfactorily proved as to voice identification, and not satisfactorily translated for the jury by a fair due process translation procedure?

8. As to petitioners Dioguardi and Sutera, was the evidence sufficient to prove knowledge of illegal importation of narcotics?

9. As to petitioner Nebbia (and, by prejudicial overflow, as to the other petitioners) was there a denial of due process, right of confrontation, right to be present at one's own trial for crime, and effective assistance of counsel, by the refusal of the trial Court to provide Nebbia with an impartial, Court-appointed French interpreter qualified to render simultaneous translation for Nebbia's understanding of the proceedings, it being undisputed that Nebbia cannot understand or speak English?

10. Was the Government's seizure of the narcotics in Georgia done by unconstitutional search and seizure? (Not argued in this brief)

11. Were petitioners denied a fair trial by the trial Court's handling of a request from the jury to have read



to them the testimony as to what the Narcotics Agents overheard in alleged conversations between petitioners Dioguardi, LeFranc and Sutura at the Adano Restaurant in New York City, the trial Court having allowed to be read to the jury primarily the direct testimony of the Agents themselves and not the relevant entirety of their cross-examination testimony, which latter we contend had destructively impeached their direct testimony of having been able to overhear what they said they overheard as a matter of the sheer physical possibilities of the scene?

12. Were petitioners denied a fair trial by an impartial jury in view of the fact that after commencement of the trial in New York City an article appeared in a newspaper of that City referring to petitioner Dioguardi as "Frank Dioguardi [sic] 42, identified by the Government as an underworld figure here", and the trial Judge having refused to hold a hearing on whether the Government had in fact "leaked" the information? (Not argued in this brief)

13. Was the evidence sufficient for submission to the Jury or for conviction?

### **Constitutional Provisions and Statutes Involved**

The case involves the Fourth (search and seizure), Fifth (due process and self incrimination), Sixth (impartial jury, confrontation, presence at trial, assistance of counsel) and Ninth (reserved right of privacy) Amendments of the United States Constitution. It also involves 21 U.S.C. §§ 173, 174 (narcotics violation), and F.R. Cr. P. Rule 28(b) (Court appointed interpreters); these statutory provisions are quoted in Appendix A hereto, *infra*.

## STATEMENT OF THE CASE

Petitioners were tried together on a charge of narcotics importation conspiracy (21 U.S.C. §§ 173, 174), and they were all convicted (S.D.N.Y., Palmieri, D.J. and a jury). They were sentenced as follows: Desist, 18 years; Dioguardi, 15 years; LeFranc, 20 years and a committed fine of \$5,000; Nebbia, 20 years and a committed fine of \$5,000; Sutera, 10 years. The United States Court of Appeals for the Second Circuit has affirmed all of the convictions. This certiorari proceeding seeks review of the latter judgment of the Court of Appeals.

### The Indictment

The indictment (24a\*) was filed January 5, 1966 (1a). It charges that from on or about August 1, 1965, to the date of the indictment, in the Southern District of New York and elsewhere, the defendants Dioguardi, Sutera, Desist, LeFranc and Nebbia, together also with another defendant Herman Conder, and others to the Grand Jury unknown, conspired to violate 21 U.S.C. §§ 173 and 174, (1) by importing narcotics from France and other countries to the Grand Jury unknown, (2) by receiving, concealing and facilitating the transportation and concealment of narcotics and knowingly importing them unlawfully into the United States, and (3) by attempting to conceal the existence of the conspiracy. Six overt acts were alleged, no. 3 of which related to Dioguardi and Sutera, as follows (25a):

“3. Further in pursuance of said conspiracy and to effect the objects thereof, on or about December 17,

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\* “a” refers to the printed “Joint Appendix For Appellants” in the Court below.

1965, the defendants Jean Claude LeFranc, Frank Dioguardi and Anthony Sutera were present in the vicinity of 115 West 48th Street, New York, New York, in the Southern District of New York."

The bill of particulars as to Dioguardi and Sutera specified, with respect to the above quoted overt act No. 3, "Adano's Restaurant, between approximately 8:45 P.M. and approximately 11:00 P.M." (R. 2920).

The overt act allegations concerning Nebbia were: Nebbia was named in overt act No. 1 as having traveled from Paris, France to the United States on or about December 14, 1965 and registered at the Waldorf-Astoria Hotel in New York; overt act no. 2 alleged that on or about December 16, 1965 Nebbia and Desist had a conversation at a stated place in New York City (specified in the bill of particulars as the Waldorf-Astoria at approximately 8 P.M.); overt act no. 6 alleged that on or about December 20, 1965 Nebbia and LeFranc traveled from Columbus, Georgia to New York City (25a-26a).

The overt act allegations naming LeFranc include those referred to above in connection with Dioguardi, Sutera and Nebbia. They relate to LeFranc's alleged conversations with Dioguardi and Sutera on the evening of December 17, 1965 at the Adano Restaurant on West 48th Street in New York City; and to his alleged airplane trip with Nebbia from Columbus, Georgia back to New York City on December 20, 1965 (25a-26a). The bill of particulars as to LeFranc stated that "The Government will claim the defendant LeFranc had constructive possession of the narcotics" (R. 2922-2923).

The overt act allegations as to Desist include the one referred to above as to a conversation with Nebbia on December 16, 1965, and a conversation on December 19, 1965 with Herman Conder in Columbus, Georgia; and that on the latter date Desist traveled from Columbus, Georgia to the Southern District of New York (25a-26a).

### **The Government's Theory of the Case\***

The Government's theory of the case was that petitioner Desist, a United States Army Major stationed in France, and Herman Conder, a United States Army Warrant Officer in France,\*\* in October 1965 shipped to the United States a deep freeze unit in which was concealed a large quantity of pure heroin; that Desist came to the United States in December, 1965 to contact Conder who had meanwhile moved back to this country, and to get possession of the heroin in collaboration with petitioners Nebbia and LeFranc; that Nebbia and LeFranc also came to the United States around that same time; that in Nebbia's hotel room at the Waldorf-Astoria Hotel in New York City he held conversations (separately) with Desist and LeFranc which revealed alleged important details of the alleged conspiracy as overheard and recorded on an electronic apparatus which the Government claimed involved no "trespass" because the apparatus was claimedly located entirely within the bounds of a hotel room engaged by Narcotics Agents, immediately adjoining Nebbia's hotel room;

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\* Record references for factual recitals in the following summary are given in other connections *infra*.

\*\* Conder was indicted in this case, but was severed for trial and he testified for the Government.

that after the "bugged" Waldorf-Astoria conversation between Nebbia and LeFranc, the latter was followed by Narcotics Agents who saw him meet with petitioners Dioguardi and Sutera, and thereafter the Agents overheard LeFranc, Dioguardi and Sutera conversing at a small bar in a New York City restaurant (Adano's), the conversation allegedly being relevant to the within conspiracy charges and indicating (according to the Government) that Dioguardi and Sutera were negotiating with LeFranc for purchase of the heroin which was somewhere in Georgia or the Georgia region; that thereafter Nebbia and LeFranc flew to Columbus, Georgia where they met Desist; that Desist was staying at the Black Angus motel in Columbus, Georgia; that Nebbia and LeFranc rented a car in Columbus and later another car in Atlanta in which they made various peregrinations denoting furtive purpose and activity; that Nebbia and LeFranc visited Desist's room at the Black Angus motel; that Desist met with Conder at the Black Angus motel restaurant; that the Agents tracked down Conder and placed his home under surveillance; that Nebbia and LeFranc, evidently suspicious that they were being watched, returned to New York, and Desist did likewise, without taking possession of the heroin; that Nebbia and LeFranc had been followed by Government vehicles as they traveled around the Atlanta-Columbus region; and that on the day after Nebbia, LeFranc and Desist left the Georgia region the Agents, under a search warrant, seized the heroin from Conder, and then placed him under arrest.

The Government's proofs at the trial consisted of testimony by Conder; testimony by Narcotics Agents as to the New York City eavesdropping, the Adano restaurant conversation, and the movements of the various defend-



ants in New York and Georgia; testimony by airline employees, car rental company employees and the like; and the introduction into evidence of the seized heroin.

There was no proof by the Government at the trial, and no other indication until the appeal (*infra*), that the Government had also trespassorily "bugged" one of the rental automobiles used by Nebbia and LeFranc in Georgia, as well as conversations of Dioguardi in Miami, Florida, in 1962-1963.

### **The Trial Proofs Particularly Relating to Nebbia**

It is undisputed that Nebbia arrived in New York from Paris, France and checked into Room 1602 of the Waldorf-Astoria Hotel around December 11, 1965. The electronic bugging of Nebbia's hotel room is described, from the technical standpoint, in another connection *infra*. That bugging is said to have revealed two important conversations, one by Nebbia with Desist about 8 P.M. on December 16, and another by Nebbia with LeFranc about 4:30 P.M. on December 17. Agent Kiere, who was monitoring the listening device in the adjoining room 1600 at the Waldorf-Astoria testified as to what he personally heard coming through on the amplifier simultaneously with the making of tape recordings (R.553-563). Kiere said that in the Nebbia-Desist conversation he heard the following (R.558-561):

"A. The two defendants were conversing. The defendant Desist said that he was going to fly to Rochester, New York, that he was going to see the boss, and that from Rochester, New York he was going to fly to Atlanta, Georgia, and from Atlanta, Georgia, to Columbus.

He said that he would call someone, not mentioned by name, to come to get him at the Columbus Airport.

He stated to Nebbia that there was a problem that he had to do with someone not named, that he would come and put twenty bills in his hand, and if he showed up now with nothing in his pocket there might be a little problem in getting the merchandise.

Q. Incidentally, Agent Kiere, what connotation does that word 'merchandise' have to you as a narcotics agent?

Mr. Younger: Objection.

Mr. Stream: Objection.

The Court: Overruled. You may testify.

A. As a narcotics agent merchandise means a certain amount of heroin or narcotics.

Q. Very well. Go ahead. A. Mr. Desist also inquired of Mr. Nebbia concerning suitcases. Mentioned the name Black Angus and referred on several occasions to a motel in Columbus.

He said it would take three or four hours to make the transfer and at one portion of the conversation he said—

Q. Who said— A. Mr. Desist said, 'You are fortunate'—'I am fortunate, I am about two days, whereas it will take you approximately a week to return to Europe.'

On two or three occasions the word 'trailer' or 'shed' was mentioned.

Mr. Nebbia explained to Mr. Desist that he was going to take an airplane from Atlanta and meet him in Columbus. There was a conversation, Mr. Desist asked Mr. Nebbia, 'Do you have a driver's license?'

Mr. Nebbia replied, 'Yes, I do.'

Mr. Desist said, 'I have an American license but it is expired. When I went to rent a car they would not accept it and I had to show my French license.'

Mr. Nebbia said, 'Well, it doesn't matter because you are an American,' to which Mr. Desist replied, 'No, it is worse.'

Mr. Nebbia also said there are risks involved. There was some more small talk, but this is in essence what that conversation consisted of.

Q. Calling your attention to December 17th—

The Court: Before you get to that, may I interject with a question?

This conversation between Nebbia and Desist was that in French?

The Witness: Yes, sir, it was, your Honor.

The Court: All of it was in French?

The Witness: Yes, it was, your Honor.

The Court: Did either Nebbia or Desist have a perceptible accent?

The Witness: Yes. Mr. Desist spoke French well. However, he had a marked American accent. Also I would like to point out throughout the conversation both men referred to each other in the familiar form of French by the use of 'tu' instead of the more respectful 'vous'."

Kiere testified that in the Nebbia-LeFranc conversation he overheard the following on the electronic bug (R. 561-563):

"Q. With respect to the conversation of December 17th will you tell us, Agent Kiere, the substance of that conversation which you overheard? Preliminarily, let me ask you, was this conversation in English or French? A. This conversation was again in French.

Q. Tell us if you will please the substance of the conversation.

Mr. M. Edelbaum: Same objection.

The Court: Same ruling.

A. The conversation again was in the familiar form with the word 'tu' rather than 'vous' indicating people who have known each other for a while or are familiar with each other.

Mr. LeFranc and Mr. Nebbia were conversing at this time at approximately 4:30 in the afternoon of the 17th. Mr. LeFranc stated that he would go get a ticket for Atlanta and from there to Columbus for Nebbia.

Mr. LeFranc inquired of Mr. Nebbia whether he had suitcases and said, 'Will you buy some suitcases down there.' In a fairly long sentence he repeated, 'You will get the car, we will arrange to buy the suitcases and then from there we will go to the motel. You will leave me at the motel, you will take care of things.'

And again in this conversation the word 'trailer' or 'shed' occurred.

The Court: When you say 'trailer' or 'shed', you mean there is a French word which you have translated in both ways or in one of those two ways?

The Witness: The French word 'baraque' or—

The Court: How do you spell that?

The Witness: B-a-r-a-q-u-e.

The Court: Which you say connotes either a trailer or a shed?

The Witness: Yes. In my estimation it can be translated either way, or 'cabane' which also is a French word which most likely referred to shed rather than trailer.

Mr. LeFranc stated in the course of the translation there are people who come over here with things, they have lost these things and they have

disappeared. So you know this has happened before. To which Mr. Nebbia replied, 'Unfortunately there are people like that.'

In essence this is the conversation which I overheard.

Mr. Tandy: Your Honor, at this time I should like to offer in evidence Government's Exhibits 85, 85-A, 85-B and Government's Exhibit 86 for identification.

Mr. Edelbaum: We would object on all the grounds heretofore stated, your Honor.

The Court: I make the same ruling with respect to the evidence, not being presently connected to the three defendants already mentioned, so that Mr. Jones and Mr. Edelbaum's objections meet with the same ruling.

Mr. Stream: The objections are the basic ones made in chambers.

Mr. Edelbaum: I object on the ground heretofore stated during all of our discussions, your Honor.

The Court: Very well. I overrule those objections. The tapes may be marked in evidence."

We note that Kiere's claim of having heard the word "trailer" in the Nebbia-Desist conversation is highly questionable, because no such word or reference appears anywhere in the transcript translations of the tapes prepared by Kiere with much painstaking labor before the trial. See Government exhibits 19, 20 and 21, all for identification (see Point III, *infra*). This alleged "trailer" reference is of utmost importance because of the imputation of a connection with Herman Conder in Columbus, Georgia, where the narcotics were seized on December 20.



The question of how agent Kiere knew that the voices he heard were those of Desist, Nebbia and LeFranc is of prime importance in this case (Point III, *infra*).

Carol Rippe, a ticket agent for Eastern Airlines at the airlines building, 80 E. 42nd Street, testified that on December 16, 1965 she wrote a ticket for Mr. J. Nebbia to fly from New York to Atlanta and Columbus, Georgia on December 18; Nebbia was there with LeFranc, both of whom she identified in Court; LeFranc did the buying of the ticket for Nebbia and conducted the conversation with Miss Rippe; LeFranc originally asked for a ticket to Atlanta, and when Miss Rippe asked where they were going after that (with a view to helping them with further reservations), LeFranc said that they wanted to go to Columbus, Georgia, so Miss Rippe told them that Eastern Airlines could fly them to Columbus directly; when Miss Rippe asked LeFranc if he wanted to book a return trip he said no, because he would be renting a car in Columbus and driving around there, and would then be going on to Miami; when Miss Rippe then asked LeFranc if she could help them with a reservation to Miami on Eastern Airlines, LeFranc said that their plans after driving around Columbus were not definite as to how they would travel to Miami (R. 985-991). Miss Rippe also testified that on the next day, Friday afternoon December 17, 1965, she saw LeFranc again at the ticket counter (R. 991). Through Miss Rippe the Government introduced in evidence its exhibit 59, Nebbia's airline ticket (R. 992).

Nebbia and LeFranc traveled to Columbus, Georgia on the morning of December 18, agent Kiere being on the same plane (R. 627-630). We have alluded to the massive sur-

veillance in Georgia in which Nebbia and LeFranc were seen with Desist and were said to have engaged in certain furtive movements around or near the area where Conder was, Nebbia and LeFranc returning to New York on the night of December 20 without being claimed by the Government to have achieved any contact with Conder or with the latter's cache of narcotics. For the surveillance testimony in Georgia, and related testimony see R. 1368-1389, Baker; R. 1442-1452, Thompson; R. 1452-1496, Waters; R. 1544-1559, Pair; R. 1550-1557, Ratteree; R. 1566-1570, Priest; R. 1572-1582, Johnson.

Exceptionally impressive character testimony was introduced on Nebbia's behalf, and we respectfully urge the Court to examine it (R. 1914-1937).

**The Trial Proofs Particularly Relating to Dioguardi  
and Sutera; the Limited Sector of the Case Involving  
Those Two Petitioners**

As seen, the Waldorf-Astoria bugging of Nebbia's room between December 14 and 18 or 19, 1965, is said to have disclosed two important conversations for the purposes of the Government's case, one being the conversation of December 17, about 4:30 P.M. between Nebbia and LeFranc. The Government claims that after this latter conversation between Nebbia and LaFranc was bugged in the afternoon of December 17, Agents followed LeFranc, and that the latter met that evening with the defendants Dioguardi and Sutera after which those three went to a restaurant on West 48th Street in New York City called Adano's. Three Agents are said to have followed them into the restaurant and to have overheard a conversation at the bar in which there were references to some kind of transaction or contem-

plated transaction involving Atlanta and "merchandise"; the conversation also allegedly included remarks denoting that risk was involved in making "these transfers"; and the parties allegedly spoke of eventually meeting in Miami and of making a "transfer" by LeFranc to Dioguardi and Sutera, etc.

The sole inculpatory testimony as to Dioguardi and Sutera is that which deals with the above mentioned alleged conversation with LeFranc at the Adano Restaurant on the evening of December 17, 1965. This testimony needs to be noted in detail.

Three Agents are said to have been present at this conversation (Agents Smith, Gruden and Thomas). The Government called Agents Smith and Gruden to testify as to this branch of the case. Gruden described the alleged conversations as follows (R. 1057-1064):

" . . . After entering the restaurant they stood at the coat check room there and as they were checking their coats, I was able to overhear them talking. LeFranc was talking about the filth of New York City and the fact that he had dirt in his eye and he had to go to the hospital to have it removed.

He further went on to say that he was looking forward to the trip down south in the morning, and that he heard Atlanta was a much cleaner place than New York City.

Dioguardi agreed with LeFranc that New York City was a dirty place and that he would indeed like Atlanta much more and would find it a much cleaner place than New York City, and that he would enjoy the night life of Miami more than New York City.

Q. What language was this conversation in? A. English, sir.

Q. Where was the coat check room in relationship to the entrance to the restaurant? A. Well, as you walk in the door, the coat check room, as you walk in the door, would be directly in front of you, approximately maybe six to eight feet in front of you.

Q. Was there any further conversation that you were able to overhear while you were waiting? A. Yes, sir. I overheard Sutera state that he also thought New York was a dirty place and he would be looking forward to going to Miami. He further stated that the thing that annoyed him most about New York was the crowded conditions and the heavy traffic.

Q. Did Dioguardi, Sutera and LeFranc check their coats then? A. Yes, they did.

Q. What did you do? A. I also checked my coat and then went to the bar.

Q. And where did the defendants Dioguardi, Sutera and LeFranc go? A. They went to the bar also.

Q. Would you describe to the jury what that bar was like, what it looked like, and what its relationship was in that restaurant? A. Well, the bar would be, as you are facing the coat check room, the bar would be directly to the left, say, a small, more of a service bar, approximately, I would say, approximately twelve feet long. It's very small.

Q. Was it as long as this jury rail? A. I would say it was shorter than the jury rail.

Q. Was there a bartender there working? A. Yes, sir, there was.

Q. Did you go over to the bar as well? A. I did.

Q. What did you do? A. I ordered a drink.

Q. And did the defendants order a drink? A. They did.

Q. Tell us what happened then? A. Shortly after I got to the bar I was joined by Agents Thomas and Smith. After being joined by them, we all ordered a drink. Then I observed Dioguardi leave the bar and walk in the direction of the telephone which is located on the side of the coat check room. He was followed by Agent Smith at this time. Shortly later he came back to the bar and joined Sutera and LeFranc.

At this time I overheard him say, 'O.K., everything is all right on my end.'

Q. Who did you overhear say that? A. Dioguardi stated, 'O.K., everything is all right on my end, but we still have to iron out a few problems.'

Sutera then remarked that 'We haven't seen anything yet.'

And then LeFranc stated, 'I have explained this to my friend who has assured me that it is here already. All we have to do is go down there, pick it up, and then make the transfer to you at a place of mutual agreement.'

Q. And who said that? A. Mr. LeFranc.

Q. How far were you from these three people when you overheard this conversation? A. I would say three feet.

Q. How many bar stools were at that bar, if you recall? A. I don't recall. There were very few.

Q. Did you hear any further conversation? A. Yes, sir, I did.

Q. Would you tell the jury what you heard? A. Dioguardi stated to LeFranc, 'Your friend doesn't trust anyone. We, too, like to be careful about these things, but we would like to know a little bit more about the way the deal is to come off.'

Then Sutera remarked that—he suggested that they would go with LeFranc in the morning to Atlanta, to pick up the merchandise, and thus save LeFranc the trouble of making an extra trip.



LeFranc replied that this was impossible, that he and his friend would go to Atlanta, pick up the merchandise and then call them later in Miami for the transfer.

Sutera remarked that this seemed like a waste of time, and then during this time LeFranc stated that 'These transfers are risky business, there is much to lose here and one cannot be too careful, so we must insist that we do it our way. In the past people have been betrayed, and everything has been lost, even the people.'

Q. Are you giving us the exact words of the conversation, as best you recall? A. No, sir, I am giving you, as I remember, the substance of the conversation.

Q. And are any of the words that you are testifying to the exact words? A. Yes, sir.

Q. Do you recall which ones? A. I specifically remember them on several occasions saying 'transfer,' 'the merchandise.' I specifically remember them saying 'the trip to the south in the morning, to Atlanta.'

Q. How long have you been an agent of the Federal Bureau of Narcotics? A. Approximately two and a half years.

Q. Does the word 'merchandise' have any meaning to you? A. Yes.

Mr. M. Edelbaum: Objection.

The Court: Overruled.

Q. What does the word 'merchandise' mean to you—

Mr. M. Edelbaum: Objection.

Q. —as an agent of the Federal Bureau of Narcotics?

The Court: Overruled.

A. The word 'merchandise' denotes to me narcotics, particularly heroin.

Q. Do you remember any further conversation at that bar? A. Yes. Mr. LeFranc further went on to say that 'In the past people have been betrayed, and everything has been lost, even the people; we must insist that we do this our way.'

He further went on to say that 'I myself have never met the contact man, but once I receive the merchandise, I will make the transfer personally to you.'

Q. Who said that? A. Mr. LeFranc.

Q. And who did he say it to? A. He was speaking to Dioguardi and Sutera.

Q. Was there anything else that you heard? A. Yes, sir. They then asked him—Mr. Sutera then asked him, 'When will we meet you?' And he stated he couldn't be sure until the transfer was made to him.

Q. Who is 'he'? A. Mr. LeFranc stated that he couldn't be sure until the transfer was made to him, and that he didn't want to hold on to the merchandise for too long, that it would probably be the night after, maybe Monday or Tuesday.

He further went on to say that he would have a car, and the transfer would be made from the car supplied by him to a car supplied by them, and that he expected this to be Monday or Tuesday. He also suggested that he felt the nighttime would be safer.

Q. Who is this who is talking? Who suggested that the nighttime would be safer? A. This is Mr. LeFranc talking.

Q. Do you recall whether either Dioguardi or Sutera made any response to that? A. As I recall, there was a remark made at the bar, 'Perhaps when this is over you can enjoy the night life of Miami,' and Mr. LeFranc did respond, he would be much relieved, he would be much relieved when this was over."

Agent Smith described the alleged Adano restaurant conversations as follows\* (R.1139-1144):

"A. As I entered the restaurant, after checking my coat I joined Agent Gruden at the bar. He was standing at the south end of the bar, closer to the south end. I observed Douheret,\* Dioguardi and Sutera standing at the north end of the bar.

Right after entering Dioguardi left Sutera and Douheret and he walked to a telephone booth which is on the back end of the hat check.

Q. What did you do? A. I left the bar, walked over and stood near the telephone, jiggling some coins in my hand. I overheard Dioguardi on the phone talking to someone. He stated he was with the man now, and they were leaving for Atlanta in the morning. He paused, and then he said that he wasn't sure, but he expected to see him again either Monday or Tuesday, and that they would call him in Miami confirming the time.

He then completed the call and walked back to the bar. I then went to the telephone and placed a call to the office of the Bureau of Narcotics.

Q. What did you do after placing the call? A. I returned to the south end of the bar and rejoined Agents Gruden and Thomas.

Q. What happened then? A. I observed the three, Sutera, Dioguardi and LeFranc at the bar. I overheard parts of their conversation. I overheard Sutera say to Douheret that they had not seen anything yet, and Douheret answered, he said, he had explained that to his friend who assured him that it was here already. All they had to do is go down there and pick it up and make the transfer somewhere down there, wherever they could agree upon.

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\* "Douheret" is Le Franc.

Sutera—Dioguardi then said to Douheret that 'Your friend don't trust anyone,' and Sutera then asked, then suggested to Douheret that they go with him down to Atlanta tomorrow, pick up the merchandise and save him an extra trip.

Q. Let me interrupt you at this point and ask you this question. What does the word 'merchandise' connote to you as a narcotics agent?

Mr. M. Edelbaum: Objection.

Mr. Jones: Objection.

The Court: Overruled.

A. The word 'merchandise' denotes to me narcotics.

Q. Go ahead. A. At the suggestion of Sutera that he accompany Douheret down to Atlanta, Douheret said no, it was impossible, he would have to do—they would have to do it the way that he and his friend wanted them to do it.

Sutera then said, 'It seems like a waste of time,' and Dioguardi told Douheret that 'We should—you should—your friend should trust us more.'

Douheret then said that 'These transfers are risky business. In the past people have been betrayed and everything was lost, even the people. There is much to lose in this transaction, so we must insist that we do it our way. When I know the time I will call you in Miami.'

Dioguardi and Sutera started to interrupt him, but he continued and told them that—he told them that others before them have made these transfers a risky business. So he said that 'he is my friend. I know that you are all right, but he, he insists that it be done his way.'

He said, 'I myself have never met his contact man, but when I receive the merchandise I will make the transfer to you myself.'

Sutera then asked him, 'Well, all right.' When will we see you?'

And Dioguardi wanted to know how the deal would go down. He said he could not—

Q. Who said? A. Dioguardi asked Douheret how the deal would go down, and Douheret said, 'I cannot be sure until the transfer is made to me,' but he said that he didn't want to keep the merchandise long, so it would be the night after he received it, either Monday or Tuesday. He told them that he would have a car and a transfer would be made to a car supplied by Dioguardi and Sutera. He suggested that night would be safer. He told them he couldn't be sure until he received the merchandise, and then he would call them. He expected it would be on Monday or Tuesday.

Q. What else happened? A. Sutera then told him that after the transfer was made he would be able to enjoy Miami. Douheret said he would be much relieved.

Right after this, shortly after this, the waiter came and told Dioguardi that his table is ready.

They then walked to a table just north of the bar. Dioguardi sat facing west, to the right of Douheret who sat with his back to the bar, and Sutera was facing east, he was to the left of Douheret.

Shortly after they went to the table I had a conversation with Agent Thomas and a conversation with Agent Gruden.

Q. Where was Agent Thomas? A. He was at the bar.

Q. With you? A. Yes.

Q. Go ahead. A. Right after the conversation Agent Thomas and Gruden left the bar, and I then moved to—I was then the only occupant of the service bar, I moved down to the north end of the service



bar, closer to the table occupied by Dioguardi and Sutera and Douheret.

About 10 o'clock I heard Dioguardi say he was going to place—make a telephone call. As he got up I walked to the phone booth, and I placed a telephone call. When Dioguardi came to the telephone I was on the telephone. He then returned to the table. A few minutes later he came up to the telephone and placed a telephone call.

Q. By 'he' who do you mean? A. Dioguardi.

Q. And where were you when he came to the telephone? A. As he started for the telephone I was at the bar, I went to the telephone, I waited about 30 seconds to a minute, then I walked over and stood near the telephone. I overheard him telling someone that he would be leaving soon; this was a once-a-year deal and it takes time to iron out the problems; it would not be long because the person who was leaving had to get up early in the morning, and that he would make it up to the person he was talking to.

He then returned to the table with Douheret and Sutera."

The Dioguardi and Sutera defense at the trial probed insistently into several aspects which were believed to afford strongly circumstantial indications that the above testimony of the agents was unreliable to the point of incredibility as a matter of law. Because the bar in the Adano Restaurant was so small as to make it intrinsically beyond belief that alleged conspiratorial malefactors such as the within defendants would have conducted the above kind of conversation in the necessarily close proximity (indeed contiguity) to three strangers in such close quarters—the entire linear space available at the bar for patrons was not more than ten feet, nine inches minus a space of perhaps three feet

for service implements (R. 1901-1908, 1912)—the defense devoted its most earnest efforts to exploring the factual issue of whether the agents were in fact present at the Adano bar as claimed. To begin with, the Dioguardi-Sutera defense adduced what we think we may say were strong proofs on the “physical facts”.\* The agents themselves had testified that at this linear bar space of less than eleven feet (minus three feet for service implements and two to four feet unused at the ends of the bar (*infra*)), there had been a gap of two to six feet between their group and the defendants’ group (R. 1121-1122, 1877, 1301, 1060, 1085); and that, as above intimated, there was an unused space of one to two feet at each end of the bar (R. 1121-1122). Furthermore two employees of the Adano Restaurant testified without contradiction—and, be it noted, without cross examination by the Government—that never in their many years of experience at that place had there been as many as six persons at the bar at one time (R. 1910, 1913). All of the agents also swore that they heard no music or TV while they were in Adano’s (R. 1093, 1011, 1231-1232, 1883). The above mentioned two employees of Adano’s swore that there was continual music (R. 1909, 1912).

Then there were several quite disturbing (we must say) contradictions among the agents’ own testimony which bring to mind Gibbon’s phrase, “A melancholy doubt obtrudes itself upon the reluctant mind”—a doubt, in this instance, *as to whether the agents were there at all, especially agent Smith*. Thus, agent Hughs, who was in a station of outside

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\* See the testimony last cited, and the photographs of the Adano bar and restaurant interior, Dioguardi and Sutera Ex’s S, P, N, X, W, V, L, U (R. 1886); see also the survey exhibit (Dioguardi and Sutera Ex. Z (R. 1905)).

surveillance across from the Adano Restaurant on the occasion in question, testified that while he saw agents Gruden and Thomas enter the place rather shortly after the defendants did (two to ten minutes) he had no idea as to when agent Smith entered the restaurant, *and it could have been as late as 11 P.M.—the others had all entered around 8:30 or 8:45 P.M. and the alleged conversation had occurred shortly thereafter* (R. 1035-1039). Perhaps even more interesting was agent Hughs' testimony that he did not even know when agent Smith left the Adano Restaurant (R. 1040)—it would in truth be logical and believable that agent Smith would not have been seen leaving Adano's, *if he had never been there.*

Other important discrepancies among the agents as to whether or when they were at Adano's may be discerned by referring, in the following juxtaposition, to the following pages of the trial testimony: R. 1188-1191, 1239-1246, 1296-1300, 1056-1057, 1059, 1080, 1864.

At R. 1817-1819 defense counsel for Dioguardi and Sutera unavailingly requested the Trial Court to permit the Jury to view for itself the physical scene at the Adano Restaurant in the light of the above remarkable testimony of the agents themselves and of the proofs pointing to the sheer physical incredibility of the agents' basic inculpatory testimony against these two defendants. See also the summation by Dioguardi's and Sutera's counsel, where the discrepancies herein referred to are systematically collected and the relevant testimony quoted *in extenso* (R. 2089, 2093, 2118-2134, 2138-2141, 2143, 2156-2159).

Dioguardi and Sutera introduced affirmative evidence in their defense as follows:- Dioguardi brought witnesses to testify that on the day in question (December 17-18, 1965)

he was transacting substantial business affairs in New York City in connection with obtaining entertainment acts for his restaurant and cabaret in Miami (R. 1824-1832, 1834-1845). In responding to the Government's proofs that Dioguardi and Sutera had registered at a motel in New York under names which were not their own, Dioguardi called the witness, Diana Perri, who testified that Dioguardi had used her name with her consent in registering at the motel (R. 1845-1855). The prosecution did not cross examine Miss Perri, and indeed the defense called agent Hughs back to the stand as its own witness to establish that Dioguardi and Miss Perri had committed no sinister or immoral acts at the times in question (R. 1856-1862).<sup>\*</sup> It was pointed out by defense counsel that Dioguardi and Sutera used their true names in obtaining their airplane tickets for this trip to New York and their automobile rental in New York (R. 2160).

What, then, is the place of Dioguardi and Sutera in this prosecutive scene? It is, simply and solely, that they are alleged to have been in the company of LeFranc and to have had a conversation with him which referred to some transaction of a "risky" nature involving "merchandise" which was to be "transferred" under some kind of security measures somewhere between Atlanta and Miami. Taking the Government's case in its best and strongest aspect, then, as to Dioguardi and Sutera, the proofs involving these two petitioners placed them in no connection whatever with any activity of any other defendant except a possible connection as prospective purchasers or agents for purchasers.

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<sup>\*</sup> Sutera called no additional witnesses; he is Dioguardi's brother-in-law and employee, and was accompanying Dioguardi on the trip to New York from Miami.

### The Trial Proofs Particularly Relating to LeFranc

As seen, Nebbia having been placed under surveillance, including electronic surveillance, after he had arrived in this country and had taken a room at the Waldorf-Astoria in December 1965, the first significant appearance of LeFranc on the scene (according to the Government's proofs) was in the alleged conversation (above quoted) with Nebbia, which was bugged, around 4:30 P.M. on December 17, 1965 in Nebbia's hotel room.

Evidently as a direct surveillance derivative from the above electronic eavesdropping on the afternoon of December 17, LeFranc was followed by agents over the next several hours, and was observed joining the defendants Dioguardi and Sutera; then came the agents' alleged overhearing of the alleged conversation between Dioguardi, Sutera and LeFranc at the Adano Restaurant later that evening, as described *supra*. This is the alleged conversation in which LeFranc, Dioguardi and Sutera are supposed to have discussed—in a manner of practically imbecilic unguardedness and foolhardiness, considering the blatantly "non-security" character of the situation as testified to by the Government's agents, who described what would have had to be a virtual cheek-by-jowl proximity between six men (three agents and three defendants) at a very small public drinking bar in a small restaurant—some kind of "deal" and "transfer" of "merchandise", with references to Atlanta and Miami and the riskiness of the transaction. See, in our description *supra* of the proofs particularly relating to Dioguardi and Sutera, the references to the trial proofs which are believed to point to the inherent incredibility, as a matter of law, of the agents' testimony concerning the alleged Adano conversation.



The following morning (December 19, 1965) LeFranc and Nebbia were observed traveling by plane to Columbus, Georgia, and during that day and the next day there occurred that previously mentioned massive surveillance of LeFranc, Nebbia and Desist in the Atlanta-Columbus, Georgia, region, in which LeFranc and Nebbia were described as engaging in furtive movements. It will be recalled that neither LeFranc nor Nebbia is accused of having made any contact with Herman Conder or with the narcotics in the latter's possession in Columbus, Georgia. There is strongly disputed testimony that LeFranc and Nebbia, in returning from Georgia to New York City, used false names; the "identification" testimony pertaining to this alleged incident was noted by the Trial Court itself as being doubtful (Z6a).

A prime factual issue at the trial concerning LeFranc was that he had, concededly, come to the United States using a false passport. The LeFranc defense introduced what we think we may say was very strongly impressive proof that his false travel documents were entirely explainable without reference to any narcotic purpose or involvement, because LeFranc was a member of a secret French political organization known as the "O.A.S.," a patriotic organization of the Algerian French dedicated to the restoration of French rule in Algeria, in opposition to the policies of President DeGaulle. See the deposition testimony (received in evidence at this trial) of the witnesses Feischoz (R. 1671-1699, 1717-1730) and Calle (R. 1731-1811, 1820-1824). Messieurs Feischoz and Calle are high functionaries of the O.A.S. residing in political exile under the asylum hospitality of the Spanish Government, their depositions having been taken in that country. Not only for the sheerly gripping, dramatic

and indeed literarily fascinating quality of this deeply moving deposition testimony by men of unmistakably heroic stamp and iron integrity of character—qualities which must be acknowledged by any reader of this deposition testimony regardless of his own political predisposition concerning the “Algerian question”—but, doubtless more to the point, for the quite convincing picture which the deposition testimony gives as to LeFranc’s own honorable services to a cause which he and his compatriot colleagues evidently regard as high and sacred, this Court might well wish to read with special closeness the testimony of Messieurs Feischoz and Calle. For, if that testimony is believed, it becomes entirely believable that LeFranc was in this country for purposes of a character, in terms of human values, diametrically opposed to any purposes of persons engaged in the international narcotics traffic. Needless to say we realize that it was for the Jury to believe or not to believe that LeFranc’s presence and conduct in this country with reference to the matters charged in the indictment and at the trial were for a purpose innocent of narcotics involvement. We nevertheless want this Court to know that the case of LeFranc is not being tendered for review here on a basis of conceded or assumed guilt, or on a basis of any silent or express acknowledgement of the sufficiency of the evidence. We have in mind also, in thus calling attention to the altogether believable alternative explanation of LeFranc’s apparently surreptitious activities in this country, that the points of constitutional injustice and unfair trial which LeFranc is raising in this case are being presented to this Court by a man who is pleading practically for his life, not in a merely technical or legalistic frame of mind, but out of a deep sense of the justness of his cause.

### **The Trial Proofs Particularly Relating to Desist**

Desist's alleged conversations and other contacts with Nebbia and LeFranc in New York and Georgia have been described. It remains to note the testimony of the Army Warrant Officer Herman Conder concerning the alleged heroin activities in France between Conder and Desist, which preceded the happenings in this country in December 1965; it will be recalled that Conder, a co-defendant, was severed from this trial and testified for the Government.

Herman Conder. (R. 30-78) testified that he knew Desist from France, where both were stationed with the United States Army in 1965. Desist was a Major, Conder a Warrant Officer. Desist was Conder's landlord in France. As Conder's European tour of duty was nearing its end in the summer of 1965, Desist broached to him that he (Conder) should obtain a deep freeze and have it shipped to the United States with his personal belongings, for which Conder would receive \$10,000. A second-hand deep freeze was obtained, Conder tidied it up and dismantled it in part, and in September, 1965, one morning, Conder found the deep freeze completely reassembled; he had no knowledge as to who had done this. The deep freeze was shipped back to this country with Conder's household goods. Before Conder left France in the Fall of 1965 Desist gave him \$300 and spoke of visiting him in the United States. Around December 12, 1965 Desist telephoned Conder at the latter's residence in Columbus, Georgia and said he would visit in a few days. On December 18, 1965 Desist and Conder met in Columbus, Desist gave Conder an additional \$2,000, and spoke of obtaining suitcases for the contents of the deep freeze, which were to be picked up by two persons referred to by Desist

as "they", whom Desist said Conder would recognize as Frenchmen. Over the course of the next two days (December 18-19) Desist met with Conder a few times, spoke of difficulties which had arisen because "they" thought they were being followed, and finally instructed Conder to purchase some suitcases in which to pack the contents of the deep freeze. Conder bought four suitcases, and on Sunday, December 19, he unpacked the deep freeze, which contained plastic bags of a white substance. Conder kept the suitcases, plus a fifth one that he had had to use to contain all the plastic bags, in his trailer and shed in Columbus, Georgia. Later that day Desist told Conder that "they" would not be picking up the suitcases for a few more days owing, apparently, to "their" fear that they were being followed.

As seen, there had been surveillance of Desist, Nebbia and LeFranc on December 18 and 19, 1965 in the Atlanta-Columbus region, which included surveillance of Desist in the alleged contacts with Conder. The climactic development was that around noontime on December 20, 1965 the agents arrested Conder and seized from his home trailer in Columbus, Georgia, and from an adjacent shed, a large quantity of heroin (209 lbs. contained in 190 plastic bags).

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The facts more specifically relating to the electronic eavesdrop issues, and to other point raised in our Questions Presented, as well as pertinent rulings of the Courts below, are treated in connection with the respective points of Argument, *infra*.

## Summary of Argument

1. The Government has conceded in this Court (Br. In Opp., p. 9) that "If the principle announced in *Katz* [*Katz v. United States*, No. 35, this Term] is to be applied to cases pending on appeal on the date of that decision [December 18, 1967], the affirmance of petitioners' convictions cannot stand." However, the Government contends that, on grounds of non-retroactivity, *Katz* should be held inapplicable to this case. We argue the retroactivity issue as such rather extensively in our Point I in this brief, but some of the subsequent points in this brief are also believed to have a bearing on the retroactivity issue, notably points which treat the quality and other sufficiency of the trial proofs (especially the proofs of the alleged content of the Waldorf-Astoria electronic recordings), and which therefore go to the single most important criterion for allowing retroactivity, namely, "the integrity of the fact finding process" as affected by the investigative or prosecutive conduct which has been constitutionally condemned by the new overruling decision (here the *Katz* decision).

2. The chronological structure of the *Katz*-retroactivity issue in relation to the present case is such as to require only a ruling of retroactivity for the benefit of cases still pending on direct review at the time of the decision in *Katz*. Our case was pending on petition for certiorari in this Court before *Katz* was decided. Also, our case involves electronic monitoring which occurred about ten months later than that in *Katz*. And when the Court below affirmed the convictions herein it had already been known for about seven months that this Court had granted certiorari in *Katz*. It is altogether likely that, but for conduct of the Government in delaying disclosure of certain other trespassory elec-



tronic surveillance additional to the Waldorf bugging (resulting in need for a protracted remand-hearing below), our case would have reached this Court in time to be set down for argument together with *Katz*. Our appeals were argued in the Court below January 19, 1967, but were not decided by that Court until October 13, 1967. This passage of nearly nine months time, by far most of which is reasonably attributable to the Government's conduct just mentioned, should be weighed as favoring a fair individualized treatment of the retroactivity problem here, rather than a simplistic treatment based on abstract categories. For example, the three cases, all then pending on direct review, which were argued together with *Miranda v. Arizona*, 384 U.S. 436, were all given the retroactive benefit of the new *Miranda* rule.

3. Aside from considerations primarily touching chronology factors as above mentioned, retroactivity is favored here on several fundamental grounds:— (a) The recent decisions on the retroactivity problem, commencing with *Linkletter v. Walker*, 381 U.S. 618, appear to have been strongly influenced, on the doctrinal level, by the preference stated in *Linkletter* for the "Austinian" "prospectivity" policy over the "Common Law" "retroactivity" policy; in subdivision B of our Point I (pp. 57 et seq, *infra*) we offer a critique of the Court's adoption of the Austinian approach in which we urge that *Linkletter* misinterpreted the Austinian doctrine, and that this leads to deeply disturbing paradoxes and doctrinal irrationalities in the actual operation of the recent decisions which have favored "prospectivity" in varying degrees. (b) The case of the petitioner in *Linkletter* was not still pending on direct review when *Mapp v. Ohio*, 367 U.S. 643 was decided, and the Court in *Linkletter* noted that

in other cases it had in fact been applying the *Mapp* rule to cases still pending on direct review when *Mapp* was decided.

(c) While *Johnson v. New Jersey*, 384 U.S. 719, 728 discounted the significance of the question of which provision of the Constitution is involved for purposes of allowing retroactivity, *Linkletter* was a Fourth Amendment case and there retroactivity was allowed (or recognized) for cases still pending on direct review. There is no decision by this Court since *Linkletter* (or to our knowledge before *Linkletter*) which disallows retroactivity in Fourth Amendment situations. And, again, the only "retroactivity" needed for our Fourth Amendment case *via Katz* (also a Fourth Amendment case) is the minimal retroactivity for cases still pending on direct review.

(d) *In any event, the Johnson case theme that the particular provision of the Constitution involved is not necessarily determinative, apparently meant only that a choice for or against retroactivity would not necessarily favor one provision of the Constitution as against another; Johnson should not be read as meaning that in different cases involving the very same provision of the Constitution disparate results as to retroactivity would be proper.*

(e) Furthermore, on the particular Fourth Amendment facts our case can claim to be entitled to stronger constitutional solicitude than the cases of the respective petitioners in *Linkletter* and in *Mapp* itself. *Linkletter* involved only the issue of a search too remote from an arrest to which it was incident, i.e., *Linkletter* did not involve the totally vitiating Fourth Amendment defect of failure to obtain a warrant plus absence of arrest-incidence; and in *Mapp* there was strong factual contention that a search warrant had actually existed. Besides, our case, unlike *Linkletter* or any of the "*Mapp*" group of cases

and their "non-retroactivity" aftermath, involves (as does *Katz*) "search" by the maximally abhorrent method of electronic spying. (f) Indeed our case is stronger even than *Katz*, because there it was found that apparently probable cause had existed which would have justified the issuance of a search warrant, whereas in our case there is nothing in the record to indicate that the agents might have obtained a warrant on probable cause to bug Nebbia's hotel room. (g) As regards the criterion stated in *Linkletter* (and subsequent decisions, *infra*) of looking to the "prior history of the rule" affected by a change-effecting or overruling decision, plus the criterion of looking to the "purpose and effect" of such rule or of changing or abrogating it, police officials in this country have been under "notice" increasingly during the last decade and more that electronic invasions of individual privacy were of profoundly doubtful constitutionality. To allow *Katz* retroactivity in our case would minimally "shock" or surprise law enforcement personages; it would minimally inconvenience or burden such personages, or Courts—the Government concedes in this case (Br. In Opp. p. 12) that the effect upon the administration of justice of a retroactive application of the *Katz* principle "would not be of the same dimensions" as in the prior cases involving the retroactivity question, and surely these "dimensions" would be even less as applied to cases of the still-pending-on-direct-review category (in this very case of ours, moreover, it is not even likely that a remand is needed if *Katz* is applied, as the fatally tainting effect of the Waldorf bugging is demonstrably "set" on the existing record). (h) Further considering the above mentioned criteria of "history of the rule" and its "purpose and effect", there is the question of "police deterrence". The purpose of such

deterrence would be notably served by a retroactivity ruling here. We deal here with almost uniquely abhorrent police conduct. *Katz* should be made retroactive at least for cases still pending on direct review—and preferably also for cases still in direct trial or other post-indictment litigation at the time *Katz* was decided—because policemen need to be told that they may not with impunity go on using so morally odious and forewarnedly unconstitutional a method of investigation down to the last possible moment until a Court of final resort decides to stop them. They should be told that they are not going to be indulged in salvaging the product of such immoral and unconstitutional malefactions which they deliberately continued down to the last possible moment, lest otherwise there occur, in all of the as yet unknown future possible situations of improvement of constitutional standards of prosecutive decency, a renewal of the same cynical police calculational strategies, with accompanying further injustice to victims and, perhaps more important, further corrosion of governmental and public morality. (i) In *Stovall v. Denno*, 388 U.S. 293, it was stated that one important factor in deciding how to handle retroactivity problems is “the possible effect upon the incentive of counsel to advance contentions requiring a change in the law”. How can counsel avoid “deterrence” of this very “incentive” functioning so praised and welcomed in *Stovall*, when counsel can never know whether, after their most ardent exertions actuated by such “incentive”, counsel may at the end find themselves (and their clients) utterly thwarted only because they have “lost a race” with other counsel pursuing the same honorable objective of a constitutional improvement in the law. (j) The Government has urged (Br. In Opp., p. 12) that the fruits of this par-

ticular prosecution based on electronic bugging should be saved because the case is so big and important. Such reasoning would allow the police to keep any such major triumph no matter by what monstrous constitutional violations obtained. This argument of the Government is one of those arguments which prove too much. (k) In *Linkletter* the Court quoted from *Mapp* the phrase "the imperative of judicial integrity"; *Mapp*, of course, was speaking of impingements of unconstitutional search upon such "judicial integrity". Further in *Linkletter* (and in the subsequent retroactivity decisions, *infra*) the Court set up the criterion of the "integrity of the fact finding process", noting in *Linkletter* that the fairness of the trial was not under attack, nor was the reliability or relevancy of the evidence. In our case the "integrity of the fact finding process" is vigorously challenged, by reason of, *inter alia*, the hopeless acoustical and French-English translational problems in connection with the electronic tapes—which moreover were undisputedly indispensable in bringing about the convictions, whereas in *Linkletter* it was stated that the search-obtained evidence "may well have had no effect on the outcome". (l) Our case, being a Federal prosecution, involves no problem of the "delicate State-Federal relationship" which was deemed important as disfavoring retroactivity in all of the decisions from *Linkletter* on (*Tehan, Johnson, Stovall, infra*). Indeed ours appears to be the first case that has come before this Court on the merits of the purely Federal aspects of retroactivity—*Miranda-Johnson*, we realize, have had Federal consequences, so that even qualifying our latter statement, we may say that ours is the first case that has come before this Court on the merits for explicit consideration of the purely Federal aspects of *Fourth*



*Amendment* retroactivity. This in turn means that in weighing the retroactivity problem here the Court may exercise its power to "supervise the administration of Federal criminal justice". (m) *Tehan v. Shott*, 382 U.S. 406, gave retroactivity (of *Griffin v. California*, 380 U.S. 609) to cases still pending on direct review. (n) *Johnson v. New Jersey*, 384 U.S. 719, preserved for possible retroactive protection on a case-by-case basis, situations which might arise involving issues as to the coercion or involuntariness of statements taken from accused persons by police questioners. This "voluntariness" reservation in *Johnson* merits consideration as favoring retroactive application of *Katz* to our case, *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, rejecting the "mere evidence" rule, nevertheless reserved for future consideration the question of applicability of the Fourth Amendment to items of a "testimonial" or "communicative" nature, or "items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure" in violation of the Fifth Amendment self-incrimination clause. Since electronic eavesdropping yields precisely this kind of "testimonial" products of "search", we invoke the "involuntariness" reservation of *Johnson*, combined with the *Hayden* reservation just mentioned, as further favoring retroactive application of *Katz* to our case. (o) Similarly, since we are challenging the "reliability", that is the probative accuracy, of the Waldorf tapes, which contained the equivalent of alleged admissions by some of the petitioners, and since *Johnson* spoke of the need to assure the trustworthiness of confessions (owing to their persuasiveness with a Jury) as being a factor in favor of retroactive protection in "involuntariness" cases, we contend that the

probative untrustworthiness of the Waldorf tapes likewise favors *Katz*-retroactivity here. (p) The direct *holding* in *Stovall v. Denno*, 388 U.S. 293, refusing retroactivity to the petitioner there, was on a factual situation of direct review proceedings having already been completed; therefore the *Stovall holding* is not opposed to our request for retroactive application of *Katz* to our case as being one still pending on direct review. Insofar as the more generally worded pronouncement in *Stovall* denies retroactivity for cases still pending on direct review, see our argument at pp. 84-85, *infra*, where we suggest grounds for distinguishing this general "dictum"-type ruling of *Stovall*. (q) Denial of retroactivity here would, paradoxically, result in retroactively validating the Waldorf bug despite its having been in violation of New York State legislation (N.Y. Penal Law, §738). There are eight States which have such legislation. (r) The *Katz* decision did not refer to the Ninth Amendment, which we raise here as supplementing the Fourth Amendment's protection against improper invasion of individual privacy. Should this case be decided in our favor on such additional or independent point of constitutionality not governed by *Katz*, the *Katz*-retroactivity problem would become academic for our case. (s) In two recent decisions of the Seventh Circuit (p. 87, *infra*) it has been taken for granted that *Katz* is retroactive in the fullest sense; also a recent Fifth Circuit decision (p. 87, fn., *infra*), while declining to apply *Katz* on the merits (to extension-telephone surveillance), did not treat such application as precluded on any ground of non-retroactivity. (t) The *Katz* decision itself rejected the Government's argument there that the agents' conduct should be retroactively validated because they relied on earlier decisions allegedly permitting "non-

trespassory" bugging. (u) Our case was originally set down for argument immediately following *Lee v. Florida*, No. 174, this Term. The structure of the issues in *Lee* is such that that case may produce a decision of renewed plenary Fourth Amendment scope which could have been applicable to our case on a "companion" basis without needing to consider *Katz*-retroactivity. (v) Finally, and perhaps most important for the retroactivity problem here, in weighing the relative policy values of constitutional justice to individual criminal defendants as against convenience of Courts and government officials, the question should be asked whether greater "burden" or "stress" is exerted on a governmental society of the Western democratic-humanistic type of ours, by incurring the judicial and administrative burdensomeness of "retroactively" reviewing criminal convictions, or by enduring the distintegrative spiritual consequences of encouraging the non-jailed multitudes of the society to turn their backs on their unconstitutionally jailed brethren. The choice is, must be, between "convenience" of the Government, and *rightness* of governmental behavior.

4. Even if *Katz* should be held inapplicable to this case on grounds of non-retroactivity the convictions should be reversed because of unconstitutionality of the Waldorf electronic proofs under pre-*Katz* standards, i.e., on the basis of accepting as true the Government's description of how the Waldorf bugging was carried out. That bugging, as described by the Government's witnesses, effected, we claim, a "parabolic mike" intrusion into Nebbia's hotel room, because the bugging utilized a special privacy-designed air space between two doors. It also utilized the "common apurtenance" of the hotel electric current. It was also preceded by an actual physical invasion of the privacy-pro-

ected air space between the two doors. And it was made possible, in the first instance, only by treacherous complicity between the hotel management and the agents, which betrayed Nebbia's trust that his privacy would be protected by his hotel host, for the hotel officials surreptitiously enabled the agents to station themselves deliberately in the room adjoining Nebbia's. Pre-*Katz* decisions of this Court, especially *Silverman v. United States*, 365 U.S. 505, which departed from the strict "physical trespass" rule, and *Osborn v. United States*, 385 U.S. 323, which upheld a minifon-type (non-trespassory) monitoring only because the Fourth Amendment search warrant procedure had been complied with, denote such pre-*Katz* standards.

5. If it should be deemed that the present record does not affirmatively show violation of pre-*Katz* standards, there nevertheless more than enough indication in the present record—including extremely disturbing evidence that the agents did not tell the truth about how they did the Waldorf bugging—to require a remand for a new plenary hearing to determine whether in fact the Waldorf bug was "trespassorily" installed in Nebbia's hotel room. On the present record the findings of both of the Courts below that the bugging was carried out in the manner claimed by the Government are profoundly unsatisfying.

6. The belated disclosure by the Government of trespassory bugging additional to the Waldorf incident, resulted in a remand order by the Court of Appeals for a further electronic hearing. But the Court of Appeals excluded from such remand hearing the Waldorf incident. This was reversible error, because of the above mentioned extremely unsatisfactory posture of the record on the question of what the Government had actually done in the course of the

Waldorf bugging. This remand order of the Court of Appeals was made after the "*Schipani*" review program had come into existence. The pretrial Waldorf-bug hearing had been completed before "*Schipani*".

7. In any event, the hearing on remand was procedurally inadequate and unfair. We go so far as to say, in all respectfulness, that it was a fiasco of due process. The Government in that remand hearing succeeded in evading any real duty of disclosure of meaningful details of the trespassory buggings (additional to those at the Waldorf) which it admitted having perpetrated.

8. No effect at all was given, in the Courts below, to President Johnson's order of June 30, 1965, addressed to the entire Federal law enforcement establishment, forbidding electronic surveillance. Indeed, to this moment, complete secrecy—evidently insisted upon by the Government and condoned by both of the Courts below—continues to shroud even the question of what were the terms and provisions of the President's order. If, as may well be the fact (which the Government has thus far not seen fit to deny), President Johnson's order was violated by the Waldorf bugging herein, the case presents an outright usurpation of executive power which, in turn, violated due process of law in the most classic sense. The act of a governmental usurper not only is not "due" process of law, it is not any kind of process of "law" at all.

9. The acoustical and French-English translational difficulties in connection with the Waldorf electronic tapes destroyed their probative acceptability. The Jury, under the procedures insisted upon by the trial Judge over defense objection, got their only knowledge of what was in those



tapes from the *ipse dixit* testimony of Narcotic Agent Kiere who had both recorded and "translated" the Waldorf conversations (which were in the French language), and who testified before the Jury as to what he heard and translated. Defense requests for a Court-appointed impartial translator were denied. The problem of the reliability of the Waldorf-bug testimony\* touches, as previously mentioned, not only the issue in this case as to sufficiency of the evidence, but also the issue as to "integrity of the fact-finding process" from the standpoint of the retroactivity criteria.

10. Sufficiency of the evidence specifically as to Dioguardi and Sutera is treated in Points IV and V *infra*. In Point IV we note that, as the trial Court instructed the Jury, Dioguardi and Sutera had to be acquitted unless the Jury found sufficient evidence of their knowledge of importation of narcotics. Such evidence could come only from the Agents' testimony concerning the alleged Adano Restaurant conversation, and this testimony, we submit, was practically incredible as a matter of law. Furthermore, in that testimony, literally only one item could be deemed relevant or material to the issue of knowledge of importation, to wit, LeFranc's words "It is here already" when Dioguardi or Sutera asked him when the "merchandise" would be available. Dioguardi and Sutera have been sentenced to fifteen and ten years, respectively, on those four words, without more. We show in Point IV that those words are egregiously ambiguous and probatively insufficient in themselves and in the light of the record as a whole, on the issue of knowledge of importation. We also urge in Point VI that petitioners were denied a fair trial by the improperly selec-

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\* It took Kiere 75 hours to "transcribe" the 45-minutes of tapes.

tive way in which the Court responded to jury questions concerning this branch of the case.

11. Petitioner Nebbia (and by prejudicial derivation, the other petitioners) was denied a fair trial by the Court's refusal to furnish him with the assistance of a Court-appointed French-English interpreter. We argue in Point VII that the consequence of this was to subject Nebbia, for all practical purposes, to the status of a deaf mute in this trial, in violation of his constitutional rights. The Trial Court's action in this regard was especially inexcusable in view of procedural recourses which were available under the then imminent new Federal Criminal Rule 28(b), which contains express built-in provisions for retroactive application to pending cases.

12. Petitioner Nebbia was denied a fair trial by an instruction to the Jury which amounted, we contend, practically to a direction that the Jury find that Nebbia's voice had been identified in the Waldorf tapes. A supposedly "corrective" instruction stated in wholly general terms, without referring to the specific damaging instruction just mentioned, was inadequate to allay this injustice. The injustice was the more grave because the electronic tapes were so prominent a part of the Government's proofs, and because they were so probatively poor. This is, also, one further factor supporting our retroactivity argument on the score of "integrity of the fact finding process".

13. All petitioners challenge the sufficiency of the evidence.

## ARGUMENT .

### Introductory to Argument

Some of the points in our Questions Presented which would otherwise stand distinct from the electronic eavesdrop constitutionality issues, blend into the latter issues owing to the problem of whether to apply "retroactively" or "prospectively" the recent *Katz* decision of this Court, No. 35, this Term. For example, our Question 7, concerning audibility and translation of the French-language eavesdrop recordings, is believed to have a prime bearing on the retroactivity question because the sheer truthfulness or "integrity" of the trial proofs in this case is at issue by reason of the acoustic condition of those recordings (Point III, *infra*)—such "truth" and "integrity" considerations being prominent in the contemporary "retroactivity" decisions of this Court (*infra*). Similarly, as to at least two of the petitioners, Dioguardi and Sutera, a substantial question is presented of adequate proof of their guilt, so that the case involves also the problem of whether a purely "prospective" operation of *Katz* would result here in denying relief to people whose guilt may not have been proved beyond a reasonable doubt; and, derivative from this problem of the dubiously proved guilt of Dioguardi and Sutera, is a *pro-tanto* problem as to adequacy of the proof of conspiratorial guilt of the other three petitioners, who challenge the sufficiency of the evidence on other grounds as well (Points IV, V, VIII, IX, *infra*).

We are mentioning in this Introductory to our Argument these examples (there are others—*infra*) of the interplay of the *Katz*-retroactivity issue with other issues in the present case because we shall be arguing the retroactivity issue as

our first Point of Argument herein, Point I, *infra*; and since the merits of those other, interplaying issues will not become fully apparent until later in the brief, we ask the Court to read Point I with these conditions in mind as to the sequence of the several Points in this Argument.

## POINT I

**The Government has conceded that unless the principle of *Katz v. United States*, No. 35, this term, is held inapplicable to this case on grounds of non-retroactivity, petitioners' convictions cannot stand owing to the Waldorf-Astoria Electronic Eavesdropping.**

***Katz* should be held to require a reversal in this case.**

### **A. Introductory To Point I: The Structure Of The Issue Of Retroactivity Versus Prospectivity In This Case.**

We take it that there is not, and cannot be, any dispute as to the materiality of the Waldorf-Astoria eavesdrop proofs in bringing about the convictions of the petitioners. The Government has so conceded in this Court (Br. In Opp. p. 9—"If the principle announced in *Katz* is to be applied to cases pending on appeal on the date of that decision, the affirmance of petitioners' convictions cannot stand."').\*

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\* The Government also mentions in the Brief In Opposition, p. 9, fn., that Dioguardi and Sutera were not present during the Waldorf-Astoria bugging; the Government's language as to this is in apparently guarded words—"We note, however, that no rights of petitioners Dioguardi and Sutera were violated by the overhearing" (*ibid*). But evidently the Government raises no issue as to the standing of Dioguardi and Sutera to participate in the challenge to the constitutionality of the Waldorf bugging. Any point on that score in the present case would seem to be settled anyhow by the plenary standards of disclosure and review, affecting both standing and materiality, illustrated in cases such as *O'Brien and Parisi v. United States*, 386 U.S. 345, and *Kolod v. United States*, U.S. , 19 L.Ed.2d 962. We showed in our

The chronological structure of the *Katz*-retroactivity issues here is as follows:— *Katz* was decided by this Court on December 18, 1967. Our joint petition for certiorari herein was filed December 12, 1967, six days before the Court decided *Katz*. Thus, to begin with, our case, in relation to the *Katz*-“retroactivity” problem, is in the category of cases which were still pending on direct review on the date *Katz* was decided. Incidentally, as will appear *infra*, but for conduct of the Government in delaying disclosure of other trespassory electronic surveillance additional to the Waldorf bugging, our case almost surely would have reached this Court in time to be set down for argument together with *Katz*. The certiorari in *Katz* was granted March 13, 1967. The appeal in our case was argued in the Court of Appeals January 19, 1967, but owing to the Government’s belatedness in disclosing the additional eavesdropping (which it disclosed for the first time about two months after the appeal was argued) and remand proceed-

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statement of the case, *supra*, not only that this prosecution in its overall or generally-viewed entirety, as to all of the petitioners, is indispensably dependent on the Waldorf bug-produced proofs (at R.2244 the Prosecutor told the Jury in summation that “Without Nebbia we had no case, \* \* \*”. He was the one we latched onto at the outset. He was the one who had the conversations with Desist and LeFranc. It was through these conversations that we heard about the merchandise. It was through these conversations that we heard about Atlanta and the Black Angus and the rest of it.”), but also that as to Dioguardi and Sutura the sole proof directly concerning them (the Adano Restaurant conversation between them and LeFranc) was obtained by the agents when they shadowed LeFranc after having bugged the latter’s conversation with Nebbia at the Waldorf earlier that same day. Of course as to LeFranc himself, and likewise as to Nebbia and Desist, there is no problem at all of “standing”. LeFranc and Desist were guests in Nebbia’s hotel room (the Government claims) during the Waldorf bugging here in issue, and all three participated (allegedly) in the respective bugged conversations here involved.



ings consequent thereon, our case was not decided by the Court of Appeals until October 13, 1967.

Thus, exactly seven months before the Court below in our case rendered its decision affirming the narcotics convictions (October 13, 1967), that Court and all the world knew that this Court had granted certiorari in *Katz* (March 13, 1967). Another operative fact of chronological interest here is that the non-trespassory electronic spying which this Court condemned in *Katz* took place a considerably longer time ago than the claimedly non-trespassory electronic spying in our case; the *Katz* eavesdropping took place in February 1965 (369 F.2d at p. 131); the eavesdropping in our case took place in December 1965. Which Judge or which lawyer would relish the task of explaining to an intelligent layman exactly why an act of electronic snooping done in February 1965 stands constitutionally condemned, but an indicatedly much more obnoxious bit of electronic snooping done nearly ten months later may not be thus condemned, and that the reason has to do with a dislike for "retroactivity"? Shall the present petitioners who were electronically spied upon nearly ten months after Charles Katz was, be denied constitutional protection because, through the vagaries of Court procedure, our case lost a race with *Katz* towards United States Supreme Court certiorari? Cf. Mr. Justice Black's discussion of the similar problem of the disparate treatment accorded to "Miss Mapp", and to the petitioner in *Linkletter v. Walker*, 381 U.S. at 640-642 (dissenting op.).

These chronological considerations affecting our case *vis-a-vis* *Katz* should be evaluated also with reference to the contemporaneous indications, which for a long time have been plain for all to see, that both Federal and State

police had plenty of cause during the times pertinent to this prosecution to feel profoundly unsure about the continuing "lawfulness" of so-called non-trespassory electronic bugging; conspicuous public agitation, on many social and institutional levels, and conspicuous ferment in the Courts, have been going on concerning the whole execrable business of electronic snooping with crescendo intensification since at least the mid-1950's; see our more detailed presentation of this theme, *infra*, and cf. this Court's solicitous notice of comparable forewarning developments in other "retroactivity" disputes of the recent period, e.g., *Linkletter v. Walker*, 381 U.S. 618, 633-634, with which contrast on this point *Tehan v. Shott*, 382 U.S. 406, 412-413.

Nor is the non-retroactivity decision in *Stovall v. Denno*, 388 U.S. 293, unfavorable to the chronological considerations which we are here posing in relation to *Katz vis-a-vis* our case, because even though *Stovall* was pending in this Court concurrently with *United States v. Wade*, 388 U.S. 218, and *Gilbert v. California*, 388 U.S. 263 (which announced the changed rules as to identification procedures), and indeed was decided the same day, *Stovall* was not thus pending on direct review, but only on collateral (post-conviction) review. The same is true of *Johnson v. New Jersey*, 384 U.S. 719; in relation to *Miranda v. Arizona*, 384 U.S. 436, which was decided only one week before *Johnson*—and we suppose it may be an open question as to what this Court would have done in the *Johnson* case if that case, which was argued, apparently, immediately following *Miranda*, had been pending on direct review; in fact, the three companion cases argued with *Miranda*, all of which were pending on direct review, were all given the benefit of the new *Miranda* rule. In light of these last mentioned facts

can there be any doubt that if the Government had not made unavoidable a slowing-down of the direct review proceedings in our case—i.e., through the Government's foot-dragging tactics in its electronic disclosures (details *infra*)—and our case had reached this Court in time to be argued together with *Katz*, as almost surely would have happened but for the Government's behavior just mentioned, we would right now stand in full beneficiary *companion* enjoyment of the *Katz* rule, just as happened in the companion cases heard and decided together with *Miranda*?

If chronological considerations count, then, especially when they arise in so close and acute a setting as is here presented, at the very least the "retroactivity"-policy choice in favor of cases pending on direct review ought surely to be exercised by the Court here. Our case is not off somewhere in a "category" of which a merely statistical or abstract general view may be taken from the standpoint of feared impact upon the conveniences of judicial administration or of prosecutive authorities (see our further discussion of this theme *infra*). Our case was lodged in this Court before *Katz* was decided, and it is before this Court now. Nor should it be overlooked that (details *infra*) our case, since May 1966, when the Government first disclosed the Waldorf bugging and the pre-trial motion proceedings on that subject were launched, has expressly thrust forward the constitutional issue of that bugging, and has continued to do so at all subsequent stages. The blunt fact is, then, that our case actively and intensively involved the Waldorf bugging issue on a litigated basis nearly a year before certiorari was granted in *Katz*.

However, we realize that, in the light of the decisions from *Linkletter* to *Stovall*, *supra*, announcing this Court's

reservation of a power to select among retroactivity-prospectivity choices on a policy basis, it would be foolhardy for us to assume that we are going to be treated here on the "direct-review-pending" basis, rather than on some basis of "prospectivity" which might close us off from participating in the benefits of *Katz*. We are therefore obliged to address ourselves to the retroactivity problem in a more comprehensive way, and we do so under subsequent headings in this Point I. In proceeding now to the more comprehensive presentation of the retroactivity issue, we respectfully ask the Court to have in mind, again, that substantial factual materials in the present record which are needed for full consideration of this issue have to be deferred until later pages in this brief in the interests of proper sequence affecting issues not confined to the retroactivity problem.

**B. Analysis Of The "Retroactivity" Decisions Of This Court From *Linkletter* to *Stovall*; *Austinian Positivism* versus *The Common Law*.**

May we begin this analysis of the Court's recent "retroactivity" decisions in the cases involving changes of constitutional principle in the criminal field, by offering these remarks:

The Court wrote in *Linkletter v. Walker*, 381 U.S. 618—where the Court first gave systematic attention to the "retroactivity" problem in the current era—that the basic policy alternatives affecting choice between retroactivity and prospectivity have been those favored, respectively, by the Blackstoneian Common Law doctrine (favoring retroactivity) and the "positivist" doctrine of the Austinian jurisprudence (favoring prospectivity). Progressively, indeed almost by a geometrical progression, this Court's deci-

sions in the few short years from *Linkletter* to *Stovall*, have approached a literal Austinianism, to the point now where *Stovall* seems to go about as far as John Austin himself might have wished—short of the ultimate position, *viz.*, the position of denying even to the winning party in the overruling case the benefit of such overruling; in *Stovall* the Court stopped just short of this ultimate Austinian position, adducing Article III of the Constitution and anti-“dictum” considerations as compelling such a halt.

It is good that the Court has halted its Austinianism, in *Stovall*, just short of such ultimate, doctrinaire Austinian perfectionism. We respectfully suggest that the time has come also, in this short and perhaps impetuous recent history from *Linkletter* to *Stovall*, for the Court to consider not only a halt but a retreat; and we respectfully think also that this present case of ours may afford a particularly appropriate vehicle for that purpose.

We have not seen in any of the decisions from *Linkletter* to *Stovall*, a mention of the “major premise” of Austinian positivism; namely, the doctrine of “parliamentary sovereignty”, i.e., the doctrine of the literally absolute sovereignty of the “Crown in Parliament”. The prodigious influence which the thinker John Austin exercised over so many of his contemporaries, and onward among subsequent generations of Anglo-American lawyers, can be best understood when reference is had to this Austinian concept of an absolute parliamentary sovereign. For, behind that concept in turn stands the anterior ideal of the *popular sovereign*. In other words Nineteenth Century Austinian positivism won and has continued to win so many influential adherents among *democratic* legal thinkers of good



will, because Austin's doctrine was "democratic" in its primal doctrinal presupposition.

Needless to say, our system of law and government in this country is likewise based upon a doctrine of ultimate "popular sovereignty"—but with important, very important, qualifications. Constitutional theoreticians assure us that our State Legislatures are the inheritors of the plenary, residual "parliamentary sovereignty" of the English "Crown in Parliament"; and that our "granted" Federal governmental powers, likewise, stem from the same ultimate source, albeit more complexly, *via* the combined Power of the "People" and the "States" who ordained the United States Constitution and retain a practically plenary power to amend that Constitution. But our constitutional theoreticians also teach us the equally important truth that, in the existing constitutional framework in this country, and with respect to both the States and the United States, we are a governmental society of *constitutional limitations*—we are not, at any given time or in any given exercise or impingement of governmental functioning in this country (State or Federal); a supra-constitutional "parliamentary sovereignty".

When the above summarized axioms of our constitutional system in this country are recalled, it appears that John Austin may really have very little to do with American constitutional theory, or, at least, that John Austin may lead us astray in our own thinking as *American* constitutional theoreticians unless we guard "with eagles' eyes" against a simplistic Austinianism.

The dilemmas posed by Austinian thinking to the minds of American Judges and lawyers have proved most difficult

of solution and most productive of debate in the area of judicial enforcement of constitutional limitations, and more particularly in judicial review of the constitutionality of legislation. A literal, puristic Austinianism would wish to hear nothing of such judicial review for enforcement of constitutional limitations; all law-declaring power, in a pure Austinian system, belongs to "Parliament". Hence writers like Mr. Dicey (*The Law of the Constitution*) never tired of reminding their readers that the English Courts do not "judicially review" English legislation. This Austinian abstemiousness in the matter of judicial monitoring of "parliamentary" legislation has generated, in this country, the judicial philosophy exemplified in Mr. Justice Holmes. But the Holmesian positivism aimed at a quite uncomplicated judicial abstemiousness, for Mr. Justice Holmes wanted Courts to allow to legislatures a maximum expansiveness of law-declaring discretion. Our point in this paragraph is that the one arguably workable way that Austinian (or Holmesian) positivism may operate *judicially* in our system is through judicious selectivity by Judges in striking down legislation as unconstitutional. It is very hard to see how this positivist philosophy can be invoked by American Judges as justification for new *Judge-made* law on some explicit "positivist" notion that Courts in this country share with legislatures in an Austinian-favored power to "posit" new or changed rules of general law. True, American Courts do exercise such power, they do so rightly (in our humble opinion), and it will be an ill day if we should ever lose this protective and creative judicial power to help law keep on evolving for effectuation of our democratic-humanistic social values. But it is odd to hear Courts say that this salutary judicial power to keep the law

continuingly alive and alert to mankind's needs, is an "Austinian positivist" power. This all-to-be-desired judicial power is nothing other than a derivative from the powers of the English Courts to declare the Common Law, a power which in this country has furthermore been brought to maximum functioning thanks only to a doctrine diametrically opposed to "parliamentary" Austinianism, the doctrine of "judicial review" for the enforcement of constitutional limitations.\*

Let us now pick up the threads of the above legal-philosophical observations to tie in with the retroactivity problems of the present case. In *Linkletter*—and, again, most recently in *Stovall* (by reference to *Linkletter*)—the Court avowed its preference for what it termed the Austinian rather than the Common Law approach. In Mr. Justice Clark's opinion for the Court in *Linkletter*, the Austinian and Common Law approaches were suggested as respectively posing alternatives between (1) the power of Courts to attach "prospective" effect to decisions, and (2) their power to attach only "retroactive" effect to decisions; and, as we read *Linkletter*, it was on the basis of this counter-

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\* To cite "authorities" for our above disquisition on Austinian and Holmesian positivism would be to weary the reader with the all-but-endless bibliography of the writings of American and English legal philosophers of modern times. The subject has been so much threshed in the writings that perhaps we may take the liberty of supplying a minimum of scholarly annotations: Pound, *The Spirit Of The Common Law* (1921); T. E. Holland, *The Elements Of Jurisprudence* (12th Ed.) (1917); A. V. Dicey, *The Law Of The Constitution*; Jerome Hall, *Living Law Of Democratic Society* (1949); Holmes, *Collected Legal Papers* (1920); Rudolf Stammler, *The Theory Of Justice* (1925); Lon L. Fuller, *The Law In Quest Of Itself* (1940); Edmond N. Cahn, *The Sense Of Injustice* (1949); Julius F. Stone, *The Province And Function Of Law* (1946).

poising of the meanings of Austin as opposed to the meanings of the Common Law approach that the majority opinion in *Linkletter* found authority in the Austinian doctrine to support the enunciation in *Linkletter* of the principle that the Constitution neither requires nor supports "retroactivity" and that American appellate Courts of last resort are free to choose between retroactivity and prospectivity on sufficiently considered pragmatic policy standards.

We do not think that we are being hyper-technical or resorting to mere legal-historical "scholasticism" in now suggesting, as we respectfully feel we must do, that the Court's handling (*per* Mr. Justice Clark) of the doctrinal materials in *Linkletter* was unhistorical. Our above summary of the doctrinal derivations and meanings of Austinian positivism suggests the desirability of a reexamination of the historical-doctrinal problem by the Court. The question is, is Austinian theory relevant at all to this Court's preference (in the series of cases from *Linkletter* to *Stovall*) for exercising its power prospectively rather than retroactively? Is this invoking of the authority of Austinian positivist "prospectivity" sound, in such situations, when it is remembered that the Austinian doctrine of a power to declare law-changes was a doctrine for *legislators* not for Courts—as we above suggested, the essence of Austin's philosophy was the concept of a plenary and absolute parliamentary sovereignty which was in turn but the agent of a likewise plenary and absolute popular sovereignty.

We respectfully ask the Court to consider that the last place in our American constitutional system where oversimplified Austinian ideas of exclusive "prospectivity" in

"law-making" should ever be allowed to operate is in the area of Court decisions. In the judicial field the nearest one may come to speaking of an Austinian function is in those cases where a Court gives effect to statute-declared or constitution-declared "legislation"; in that situation a Court serves the Austinian "popular sovereign" in the most classic sense. But this last, in turn, means that when a Court overrules a prior decision as having been erroneous under the Constitution, *Austinianism itself seemingly should demand "retroactivity" in applying the overruling decision.* For, a constitution, being "legislation", has to be given *prospective* effect from the time of its enactment, according to Austinian theory. In other words, not the prior constitutionally erroneous and now overruled court decision, but the constitution which has commanded such overruling, was the necessarily operative "law" all along—and, again, this according to Austinian theory. Viewing the situation in this way, we see the seeming paradox that the supposed rule of Austinian prospectivity as discussed in cases like *Linkletter et post* is actually a repudiation of Austinian theory because it denies to the Constitution itself a "prospective" Austinian operation; that is, paradoxically, cases like *Linkletter* and *Stovall* retroactively destroy the original prospectivity of the Constitution.

There is another paradox. *Linkletter* did not come decisionally upon the legal scene until June 1965. Before that, what *Linkletter* terms the Common Law approach, rather than what *Linkletter* terms the Austinian approach, was paramount in this Court's decisions on problems of retroactivity *versus* prospectivity. Hence it may be said that prior to June 1965 (*Linkletter*) there was a "presumption" in favor of retroactivity. Since *Linkletter's* abandonment of



this "presumption" dates from less than three years ago, and since the *Linkletter et post* series of cases are believed by us to be subject to serious criticism, we urge that, notwithstanding the latter decisions, the attitude ought to be that any further proposed decisional choice in favor of non-retroactivity in a criminal case must justify itself as against the above suggested "presumption" in favor of retroactivity. We submit that this Court's decisions from *Linkletter* to *Stovall* are too recent, of too dubious a historical-legal soundness, to deserve unchangeable continuing acceptance by this Court as against the long-accepted previous tradition of retroactivity.

One more paradoxical aspect of the situation may be mentioned. Since, again, prior to *Linkletter* criminally accused or imprisoned persons had every reason, encouraged by authority and tradition, to expect that a changing or overruling decision by a court of appellate last resort would operate retroactively, the alteration by this Court of the principles affecting such expectancy, an alteration which abruptly commenced less than three years ago, operates to take away from such expectant or hopeful criminal defendants or prisoners a "vested right" of such expectancy or hope which they had reason to believe belonged to them under the pre-*Linkletter* condition of the law. Cf. the references to such "vested rights" aspects in the *Linkletter* case itself, 381 U.S. 618, 636, and in the dissenting opinion at p. 645. Paradoxically, then, this Court's evolving treatment of the problem of retroactivity in the recent short period starting with the *Linkletter* decision, in which the Court has called attention to the need to avoid undue disruption of "vested" statuses, has been resulting, inadvertently perhaps, in taking away from criminal defendants or prisoners

that very "vested" interest which the pre-*Linkletter* cases secured.

Having perhaps tediously burdened the Court with our above remarks on the philosophical side of the subject, we would now mention that we realize the present case in all probability is not going to be decided on such philosophical considerations as regards the problem of retroactivity *versus* prospectivity of the *Katz* ruling *vis-a-vis* our case; and that more concrete considerations will probably govern the decision here. Nevertheless, we have deemed it desirable to try to eliminate from the doctrinal debate in this case an indicatedly erroneous view of the problem of John Austin *versus* the Common Law.

We turn now to a more systematic discussion of the four recent retroactivity-prospectivity decisions (*Linkletter*, *Tehan*, *Johnson*, *Stovall*).

In *Linkletter v. Walker*, 381 U.S. 618, the petitioner's conviction had become final prior to the *Mapp* case, i.e., *Linkletter* was not still pending on direct review when *Mapp* was decided. The holding of *Linkletter* was that the *Mapp* rule would not be given retroactive operation upon cases finally decided prior to the *Mapp* case, but the Court noted that in other cases it had in fact been applying the *Mapp* rule to cases still pending on direct review at the time the *Mapp* decision was rendered (381 U.S. at 622, fn. 4). Several other facets of *Linkletter* deserve special notice here.

While we are aware that in *Johnson v. New Jersey*, 384 U.S. 719, 728 (further discussed *infra*), the Court said that retroactivity or non-retroactivity is not automatically determined by the provision of the Constitution involved in the case, it may be significant of the Court's pattern in these

cases thus far that it did, in *Linkletter*, give partial retroactivity to an overruling decision in the area of Fourth Amendment search and seizure problems. Our case, too, arises under the Fourth Amendment, and *Katz* was decided under the Fourth Amendment. The partial retroactivity allowed in *Linkletter*—to apply to cases still pending on direct review at the time of the *Mapp* decision—would be sufficient to extend to our case the ruling of *Katz*. Direct precedent for this exists on the rational and persuasive basis that our case, like *Mapp-Linkletter*, involves the Fourth Amendment.

*We think it may be especially important to note that when the Court in Johnson (supra) said the particular provision of the Constitution involved is not necessarily determinative, all that the Court apparently meant was that a choice for or against retroactivity would not necessarily favor one provision of the Constitution as against another; but we do not think the Court meant that in different cases involving the same provision of the Constitution differing results as to retroactivity might be proper.*

We therefore urge that on the basis of common involvement of the same constitutional provision (Fourth Amendment protection of individual privacy against unreasonable search) in *Mapp*, *Linkletter*, *Katz* and our case, the principle of partial retroactivity (cases still pending on direct review) should be applied here directly on the authority of *Linkletter*, nothing more being needed to dispose of the question in petitioners' favor in this case.

However, in our case the considerations favoring such a result are stronger than in *Mapp-Linkletter*, as will be shown after we first further note more of the Court's reasoning in *Linkletter*.

In stating the facts in *Linkletter* the Court recited that the lower Court proceedings presented, as the specific Fourth Amendment objection in that case, that the arrest-incident search involved (the arrest having been held by the Louisiana State Courts to have been based on reasonable cause under State law) was too remote from the arrest (381 U.S. at p. 621). Thus, *Linkletter* did not involve a search of a type wholly outside the standards of the Fourth Amendment, i.e., while the search was too remote from the arrest, the search was not regarded as bad for failure to obtain a warrant, because the search was or may have been sustainable as incident to the lawful arrest. We are emphasizing this item in the *Linkletter* facts because *Katz* turned on the factor of the lack of a warrant for the electronic search, nor was there any arrest-incidence factor in *Katz* either; and the same is true in our case, where there is no search warrant and no arrest to which the search was or might be tacked. What we are saying is that the invalidity of the respective searches in *Katz* and in our case touches an even more fundamental part of the Fourth Amendment system than the search in *Linkletter*, and we suggest that this should be regarded as significant for the issue here presented. It may be noted also that in *Mapp* itself (367 U.S. at p. 645) there was factual dispute as to whether a search warrant had in fact existed. It is interesting also to note the search facts in the three cases mentioned in *Linkletter* (381 U.S. at p. 622, fn. 4) which first applied *Mapp* to cases still pending on direct review. In *Ker v. California*, 374 U.S. 23 the search was arguably incident to a lawful arrest. In *Fahy v. Connecticut*, 375 U.S. 85, the search was wholly outside Fourth Amendment standards (no search warrant and no arrest-incidence), as in

*Katz* and our case. In *Stoner v. California*, 376 U.S. 483, the search facts were similarly wholly outside the Fourth Amendment.

Consideration should also be given, in weighing the comparative gravity of these various search-fact situations, to the circumstance that *Katz* and our case involve "search" by the maximally abhorrent method of electronic spying, added to the total failure of compliance with the Fourth Amendment either as to search warrant or arrest-incidence.

Indeed our cases is stronger even than *Katz* as regards the procedural high-handedness of the agents in resorting to the obnoxious activity of electronic bugging, because in *Katz* it was mooted that apparently probable cause had existed for a possible search warrant, whereas in our case there is nothing in the record to indicate that the agents might have obtained a warrant on probable cause to bug *Nebbia's* hotel room.

It seems to us that weight should be given here to considerations along the above lines, i.e., the comparative gravity of the unconstitutional search facts in the particular case, because we are sure this Court, in deciding the present retroactivity issue, will want to consider factors of ultimate constitutional justice in the particular case, and not solely the formulary standards for administering the retroactivity problem. Surely such considerations of ultimate constitutional justice ought to weigh in that especially compelling sector of the retroactivity problem in which our case arises, the sector comprising cases still pending on direct review.

Continuing our analysis of the details of the *Linkletter* decision, we note next the Court's formulation there of its



basic standards for granting or not granting retroactivity. At p. 629 (381 U.S.) the Court said:

"\* \* \* [W]e must \* \* \* weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. \* \* \* "

Concerning the above standards of "prior history of the rule" and of "its purpose and effect", the Court in *Linkletter* concluded that, while the picture was a mixed one, the existence of the *Wolf*\* doctrine prior to *Mapp* was "an operative fact and may have consequences which cannot justly be ignored" (381 U.S. at p. 636), and this in turn led the Court to conclude that retroactive review of the many cases which might be affected by *Mapp* was unfeasible as a matter of judicial administration (*id.*, p. 637).

The Court also said that the "purpose" of *Mapp* was to deter lawless police action and that this purpose "will not at this late date be served by the wholesale release of the guilty victims" (*id.*, at p. 637).

In light of these statements in *Linkletter*, we would repeat our previous argument that, in the area of the law involved in our case, incomparably more than in the *Wolf-Mapp* situation, police had been under prolonged and ever-growing forewarning that the relevant activity (here electronic bugging done wholly outside Fourth Amendment standards) was of profoundly questionable constitutionality and would in all probability be outlawed, irrespective of considerations of "trespass". In no case decided on

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\* *Wolf v. Colorado*, 338 U.S. 25.

the merits since *Goldman v. United States*, 316 U.S. 129, had this Court approved "non-trespassory" electronic room bugging, and powerful indications in the interim had proliferatingly been pointing to the outlawing of such activity.

Also, as the Government has conceded in this Court in the present case (Br. In Opp., p. 12), the effect upon the administration of justice of a retroactive application of the *Katz* principle "would not be of the same dimensions" as in the prior cases involving the retroactivity question. *A fortiori* this is probably true as to the category of *Katz*-type (or our type) of electronic bug cases which were still pending on direct review at the time *Katz* was decided. We do not have the statistics, but it scarcely seems likely that making the *Katz* principle applicable to cases of the latter category would impose an unfeasible burden on the administration of justice.

Indeed, this is a good place to point out that this problem of burdening the administration of justice is a problem which in its nature would never have anything more than minimal impact in regard to cases pending on direct review as distinct from cases finally decided. For, it would seem that many if not most cases pending on direct review would not even have to be sent back for burdensome further hearing as to the constitutional facts but could be disposed of in that regard by the reviewing tribunals before whom such cases are pending on direct review. Such is clearly true in our own case, for example; if *Katz* applies to us, the record in our case is such that no remand would be needed for further exploration of the constitutional facts, and the Government has in effect so conceded in this case as we noted earlier (Br. In. Opp. p. 9).

True, the problem persists as to the judicial and prosecutive burdensomeness of retrial of the indictment in cases of this type, but, again, such retrials are not to be expected to be numerous in the *Katz* area; in our case, for example, it is hard to see how the case could be retried without the Waldorf-Astoria bugging proof, which so indispensably pervades and supports this prosecution.\*

As regards the police-deterrence factor mentioned in *Linkletter (supra)*, consideration of this factor in the inquiry as to applying *Katz* to our case (a case still pending on direct review) is especially interesting. Electronic spying by Government against individual privacy is, as we above said, abhorrent, perhaps uniquely abhorrent in the Fourth Amendment area affecting "searches"; the only possibly competing Fourth Amendment abhorrence which comes to mind is of the sort which this Court said it felt in *Rochin v. California*, 342 U.S. 165 (stomach pumping to search for evidence). *Katz* ruled, in effect, that non-trespassory electronic snooping is constitutionally evil and abhorrent because it attacks the high constitutional value of individual privacy which *Katz* said the Fourth Amendment protects in such an encounter. Therefore, a high public good, high values of public morality, are served by deterring police from electronic spying against private individuals. The purpose of such deterrence would be distinctly, indeed notably, served by making *Katz* retroactive at least for cases which were still on direct review—or otherwise still in direct trial or other post-indictment litigation—at the time *Katz*

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\* One reason why we devoted so much space to the description of the trial proofs in our Statement of the Case, *supra*, was to supply needed background for the line of argument here being presented on the retroactivity question.

was decided. There are several reasons why this is so. It is cynical to let policemen go on using a morally and legally questionable method of investigation down to the last possible moment until a court of final resort decides to stop them. Electronic snooping is *par excellence* the sort of police activity which should not be *retroactively condoned*, such condonation being the necessary consequence of a ruling that *Katz's* protection of individual privacy should be held prospective only; it is precisely this sort of retrospective condonation which *undeterred* police zealots are constantly counting on and piously go on rationalizing about in this branch of the law. When, as in the case of governmental police electronic spying that has been under such strong challenge in recent years, the police are *undeterredly* encouraged to continue the spying because they can expect to get away with it until a final judicial clamp-down hits them, the *Linkletter*-declared purpose of police deterrence is mocked.

It would be most salutary now, in this case, to let the police throughout this country know, that their cynical calculations have failed at least in regard to the non-trespassory electronic buggings presently still in direct prosecutive litigation, and that the police are not going to be indulged in salvaging the products of such unconstitutional malefactions which they deliberately continued down to the last possible moment. Unless such a ruling by way of deterring police is made in this case—which is the only case, apparently, presently before this Court on the merits presenting this problem in relation to the *Katz* ruling\*—there is

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\* But perhaps cf. *Lee v. Florida*, No. 174 this Term, now pending decision after argument on the merits.

bound to occur, in all of the as yet unknown future possible situations of improvement of constitutional standards of fair criminal prosecution, a renewal of the cynical police calculational strategies, with accompanying further constitutional injustice to victims and, perhaps more important, further corrosion of governmental and public morality.

At the very least, in terms of the retroactivity problem, this Court should now explicitly notify policemen everywhere in this country that when, as in the present situation, substantial forewarning of constitutional disapproval has been conspicuously building up with respect to some particularly offensive police practice that has not yet been declared unconstitutional by a court of last resort, the police should be on stern warning that when and if the constitutional blow falls on them they are not going to be allowed to salvage the cases that are in the still pending direct litigational categories. We respectfully urge the Court to make an announcement along these lines as an explicit, systematic addition to the existing law of the retroactivity problem as presently found in the cases from *Linkletter* to *Stovall*; and we believe that this case of ours is an especially appropriate vehicle for that purpose.

Further favoring such announcement by this Court is the Court's recognition in *Stovall* (388 U.S. at p. 301) that one important factor in deciding how to handle retroactivity problems is "the possible effect upon the incentive of counsel to advance contentions requiring a change in the law" (citing scholarly commentators). How can counsel avoid "deterrence" of this very sort of "incentive" which the Court has praised and welcomed in *Stovall*, when counsel can never know whether, after the most ardent exertions



actuated by such "incentive", counsel may at the end find himself utterly thwarted only because he has "lost a race" with other counsel pursuing the same honorable objective of a constitutional improvement in the law; for, obviously, precisely such thwarting is what happens when a new overruling decision is finally achieved but is held applicable only to the parties in that particular case and not even to other parties in like cases still pending on direct review or other direct prosecutive proceedings. This thwarting of "incentive" would come about in an especially painful and unjust way in this present case of ours if *Katz* is not held applicable to our case. As earlier mentioned (and see Pet. Cert. pp. 13-18). We (counsel for the present petitioners) and our predecessor counsel in this case have been locked in intense combat with the Government since the Spring of 1966 concerning the issues of the Waldorf-Astoria bugging; that combat began nearly a year before the granting of certiorari in *Katz*, and it has continued unremittingly at every appropriate stage of the case both at trial and appeal (further details *infra*).

In the Brief In Opposition herein, p. 12, the Government has also urged—after conceding (*supra*) that making *Katz* retroactive would not involve administrative consequences "of the same dimensions" as in previous retroactivity cases—that this particular case should be salvaged for the police because it is a very big narcotics case. In other words, while the Government does not even claim here that there is more than a scattering of cases in which police would be disappointed if *Katz* is made (even fully) retroactive, the Government's theme is that its narcotics police should be allowed to retain the victory they have won in the present case because it is so big, important a case. Our reply is

that if the deciding consideration is the right of police to keep a major triumph of criminal conviction simply because it is a major one, then such reasoning would allow the police to keep any such major triumph no matter by what monstrous constitutional violations obtained; this argument of the Government is one of those arguments which proves too much.

Resuming our item-by-item analysis of the *Linkletter* reasoning, we next note that at 381 U.S. p. 635 the Court, referring to illegal search-obtained evidence, quoted from the *Mapp* case the phrase "the imperative of judicial integrity". Then, on page 639 (381 U.S.) the Court in *Linkletter* contrasted *Mapp* with cases where full retroactivity had been allowed, by saying that "the principles that we applied [in the latter cases] went to the fairness of the trial—the very integrity of the fact-finding process. Here, as we have pointed out, the fairness of the trial is not under attack. All that petitioner attacks is the admissibility of evidence, the reliability and irrelevancy of which is not questioned, and which may well have had no effect on the outcome". These last quoted words of the Court in *Linkletter* are of prime interest for our present argument on retroactivity.

In the first place, the words just quoted, taken as a general statement or suggestion that problems of unconstitutional search may not necessarily affect the "integrity of the fact finding process", are dissatisfying to one's visceral feeling of constitutional sensitivity; and in the earlier of the two *Linkletter* quotations just noted (from p. 635, of 381 U.S.), "the imperative of judicial integrity", the better view seems to be recognized that tainted search-obtained evidence does in truth affect such "integrity".

Second, it is hard to imagine a more striking contrast than that between the "search" facts of our case and the "search" facts referred to in the second of the above *Linkletter* quotations. In the latter *Linkletter* quotation the Court said that "the reliability and relevancy" of the search-obtained evidence was "not questioned". In our case the "reliability" of the Waldorf-Astoria electronic recordings is questioned by us, indeed we prodigiously question it; see our full discussion in Point III, *infra*, of the acoustical imperfections in the electronic tapes as played for the Jury in this trial, and the hopeless problems of probative fairness which were presented by the fact that the tapes recorded conversations in the French language which no member of the Jury could understand. We also question the "relevance" of the Waldorf tapes, because their acoustical unreliability has worked, likewise, confusion and ambiguity as to the relevance of their contents.

Our case contrasts fundamentally with *Linkletter* also in that, whereas *Linkletter* (as seen) says the search-obtained evidence "may well have had no effect on the outcome", in our case it is undisputed (as seen) that the Waldorf electronic proofs are deemed by the Government itself to have been indispensable and decisive in the conviction.

If our presentation in the last four paragraphs has the importance which we think it does, there would arise the following quite possibly decisive point in our favor on the within issue of the retroactivity of *Katz*:— Full retroactivity has been accorded to *Griffin v. Illinois*, 351 U.S. 12, by *Eskridge v. Washington Prison Board*, 357 U.S. 214; likewise to *Gideon v. Wainwright*, 372 U.S. 335, with which see *Doughty v. Maxwell*, 376 U.S. 202; and likewise to *Jackson*

v. *Denno*, 378 U.S. 368—all of which the Court in *Linkletter* characterized as being justifiable for full retroactivity because there was involved “the very integrity of the fact finding process” (381 U.S. at p. 639). It therefore appears that perhaps the single most important standard which this Court has announced as favoring full retroactivity is that of the “integrity of the fact-finding process”. On that basis alone, we are entitled to urge that our case should be given at least the limited retroactivity benefit which we are here requesting, that *Katz* be applied to our case because we are still pending on direct review; for, as just shown, our case involves in immediate and thoroughgoing ways the integrity of the fact finding process.

Again resuming our item-by-item analysis of the *Linkletter* decision, we note next that *Linkletter* emphasized the “delicate State-Federal relationship \* \* \* as part and parcel of the purposes of *Mapp*” (381 U.S. at p. 637). Our case, being a Federal prosecution, relieves the Court of any such “delicate State-Federal” problems in arriving at a decision for or against retroactivity here. And, in fact, it is interesting that in all four of the Court’s retroactivity decisions of the current period (*Linkletter*, *Tehan*, *Johnson and Stovall*) the convictions involved were in State, not Federal prosecutions. To be sure, we are aware that, at least in regard to the *Johnson* case (denying retroactivity as to the *Miranda-Escobedo* principles), the non-retroactivity doctrine has been affecting Federal as well as State prosecutions, in decisions of the Federal Courts which have been applying *Johnson*. But we think it may well be of *de novo* interest and importance for this Court to consider now, in ruling on the retroactivity questions in our case, that our case appears to be the first one that has

come before this Court on the merits for explicit consideration of the *purely Federal* aspects of Fourth Amendment retroactivity *versus* prospectivity; it certainly is the first case in which the Court is called upon to rule upon the merits of the retroactivity question for Federal prosecutions involving electronic eavesdropping of the non-trespassory type (*per Katz*). We therefore respectfully suggest that, in resolving the retroactivity question in this case, the Court is free to include, in its decisional components, consideration of the question of how the Court should here exercise its power to "supervise the administration of Federal criminal justice." And if the Court should find merit in this last suggestion, a ruling in favor of retroactivity (of *Katz*) in our case can be made on the basis of this principle of the supervision of the administration of Federal criminal justice, without more, and without getting into the complications of the "delicate State-Federal relationship".

Finally, in connection with *Linkletter's* allusion to inconvenience or hardship imposed by retroactivity rulings on judicial and prosecutive administration—and also as regards similar observations of the Court in the post-*Linkletter* cases (*Tehan, Johnson, Stovall*)—we submit that the concern of just constitutional policy in resolving these retroactivity problems should not be primarily with judicial or other governmental administrative convenience, or even with serious burdensomeness in performance of governmental tasks, but that the foremost concern should be with *rightness* of governmental conduct. For all of the reasons previously mentioned, the considerations just suggested have special persuasiveness in a case involving the despicable business of electronic snooping. It is unseemly as



a matter of constitutional values and public morality, to make the victim rather than the wrongdoer bear the disadvantageous impact of the choices which this Court may make as to prospectivity *versus* retroactivity in a case of the present type. What, after all, is the choice, in this latter regard, that a society professing democratic-humanistic values must weigh? Can such a society better afford the "burden", "stress", "inconvenience" of sacrificing its decency, than of sacrificing its "efficient" methods and standards of criminal prosecution? We are speaking here of nothing other than the age-old problem of "ends and means". Which puts more "pressure" or "stress" on a society's institutions, and on its spiritual and moral health thought to be served by those institutions—the need to keep people in jail and to avoid expenditure of the working time and the money needed to re-litigate such jailings when challenged on fundamental grounds of constitutional decency and public morality, or the need for the non-jailed multitudes of a "good" society to go on living each day, hour, minute and second, with the haunting knowledge that hundreds and thousands of social brothers remain in *durance vile* without hope of opportunity for just constitutional remission simply because the non-jailed group are told by (and complaisantly believe) their own highest Court that it is too inconvenient, too expensive in time and money, to sift the constitutionally defined justice of the claims of the prisoners? Which of these respective "stress" impacts more surely endangers the real *safety* of a decent society of men? If the three-thousand years teachings of Western man's most revered teachers and prophets of ethics and morality mean anything, the choice between the social-"stress" alternatives just formulated cannot be in doubt. The subtle but fatal disintegrative effect on human char-

acter and human spiritual health which inevitably must result from social acceptance of this kind of injustice against helpless individuals is incalculable. History should make us all fear such a disintegrative process like, literally, "the plague". And we respectfully urge this Court to consider whether, in its decisions from *Linkletter* to *Stovall*, it has satisfied its own cultivated sense of history and public morality.

The foregoing concludes our itemized discussion of the *Linkletter* facets affecting the retroactivity question in this case. The fullness of our *Linkletter* treatment, *supra*, plus the fact that this Court's subsequent three decisions on the same subject (retroactivity)—the *Tehan*, *Johnson* and *Stovall* decisions—largely adopted the *Linkletter* analysis, makes it possible for us to treat more briefly the post-*Linkletter* decisions.

The next decision after *Linkletter* was *Tehan v. Shott*, 382 U.S. 406, which involved the question of retroactive application, to a finally decided Ohio State prosecution, of the rule of *Griffin v. California*, 380 U.S. 609, that it is unconstitutional for a prosecutor or trial Judge to make adverse comment upon a defendant's failure to testify in a State criminal trial. *Tehan* ruled, or recognized, that the *Griffin* principle was applicable to cases still pending on direct review at the time *Griffin* was announced (382 U.S. at p. 409, fn. 3). But, as in *Mapp*, *Tehan* ruled that *Griffin* should not retroactively apply to cases in which direct trial and review proceedings had become final before the date of *Griffin*. The Court in *Tehan* emphasized (1) the State-Federal problem (which is not involved here); (2) the comparatively remote or imponderable impact, of comment concerning a defendant's failure to take the stand, on "in-

tegrity" of the judicial process for ascertainment of guilt or innocence—again, a factor as to which our case presents a substantial issue owing to the egregiously poor quality of the Waldorf-Astoria electronic tapes; and, (3) above all, the reliance on the pre-existing (pre-*Griffin*) rule in six States, as to which the Court said there would be, in the event of retroactivity, "an impact upon the administration of their criminal law so devastating as to need no elaboration" (382 U.S. at p. 419)—as above shown, nothing remotely approaching such prosecutive or judicial inconvenience is portended by the granting of a retroactivity ruling for our case.

And we note again that *Tehan* did preserve the benefit of retroactivity for cases still pending on direct review at the time of the *Griffin* decision—which is, frankly, all that we ask here for the sake of our clients, the present petitioners, whatever may be the chance of the Court's adopting a more extended ambit of retroactivity of *Katz* in this or other cases on the basis of the larger framework of policy and *pro bono publico*.

The next case after *Tehan* was *Johnson v. New Jersey*, 384 U.S. 719, involving the retroactivity question as to the *Miranda* and *Escobedo* decisions. Here again, in discussing *Johnson*, we may be brief in view of our extended discussion of *Linkletter*, *supra*. The petitioners in *Johnson* sought retroactive application of the *Escobedo* and *Miranda* principles after their cases had finally been decided in direct proceedings, and this Court declined their request. Aside from aspects of the *Johnson* decision previously noted herein, the points in that decision which need to be mentioned here are: *Johnson* preserved for possible retroactive protection, on a case-by-case basis, situations

which might arise involving issues as to the coercion or voluntariness of statements taken from accused persons by police questioners. Cf. *People v. Ballott*, 20 N.Y. 2d 600 (1967). We therefore now urge, in view of the intrinsically involuntary self-incriminating character of statements which police may secure through electronic snooping, that this "voluntariness" reservation in *Johnson* should be considered here as favoring retroactive application of *Katz* to our case. The Court's rejection of the "mere evidence" rule in *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, is not opposed to this latter suggestion of ours, because in the *Hayden* case itself the Court reserved for future consideration the Fourth Amendment issue as to items of a "testimonial" or "communicative" nature, or "items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure" in violation of the Fifth Amendment self-incrimination clause.\* It is self evident that electronic eavesdropping yields precisely this kind of "testimonial" or "communicative" search-products. We therefore invoke the "voluntariness" reservation of *Johnson*, combined with the reservation just mentioned in *Hayden*, as further favoring a retroactive application of *Katz* to our case.

It should be remembered also that we are challenging the "reliability", that is the probative accuracy, of the Waldorf electronic tapes (*supra*). It is therefore pertinent to mention also that in *Johnson*, at 384 U.S. pp. 728-729, the Court noted the policy factors favoring retroactive effect for the *Jackson v. Denno* decision (*supra*) on the ground that "confessions are likely to be highly persuasive with a jury, and if coerced they may well be untrustworthy by

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\* 387 U.S. at pp. 302-303.

their very nature". The same, or substantially similar, considerations apply to electronically recorded conversations claimed to be inculpatory; such "are likely to be highly persuasive with a jury", and since they are obtained through "involuntary" (in effect "coerced") impositions upon the victim, their trustworthiness should be closely scrutinized, just as in the case of coerced "confessions". The interplay between the Fourth and Fifth Amendments hardly needs to be recalled in this connection, see, e.g., *Boyd v. United States*, 116 U.S. 618; and Mr. Justice Brennan's dissent in *Lopez v. United States*, 373 U.S. 427, collecting the authorities. This facet of the *Johnson* decision, then—reserving the "voluntariness" issue for retroactive exploration and vindication, further supports our request for retroactive application of *Katz* to this case.

*Johnson* gives pro-retroactivity weight also to the factor of "the persistence of abusive practices", in response to which, *Johnson* states, the test of judicial scrutiny "has become increasingly meticulous through the years" 384 U.S. at p. 730). Like considerations apply in this case of persistently abusive practices of electronic snooping.

*Johnson* also, at 384 U.S. p. 731, refers to the factor, in considering whether or not to allow retroactivity, of "the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed". This factor favoring retroactivity is applicable to the present case to a striking degree, as earlier demonstrated.

Finally, *Stovall v. Denno*, 388 U.S. 293, involving the question of retroactivity of the "line-up" and identification decisions, carried (as we earlier remarked) the Austinian prospectivity principles to the utmost degree short of deny-



ing relief to the prevailing parties in the overruling case itself. The proceeding in *Stovall* was one post-dating final decision in the direct prosecutive and review proceedings. The holding in *Stovall* is therefore not opposed to our request for retroactive application of *Katz* to this case as being a case still pending on direct review proceedings.

However, *Stovall* did go out of its way to preclude such retroactive application to pending cases. As regards this "dictum" pronouncement in *Stovall*, we would respectfully urge that a like ruling in our case would be shocking to law and justice for all of the reasons previously herein set forth. Besides, we take it that, speaking qualitatively as it were, the *Stovall* "dictum" as to cases still pending may not necessarily commend itself to this Court's mind when comparison is had as between the line-up-identification problems dealt with in *Stovall* on one hand, and the electronic spying problems involved in our case.

But if the *Stovall* "dictum" above mentioned was meant by the Court to portend a general principle of decision denying retroactivity even for cases still pending on direct review, we must then renew, with all respectful earnestness, our suggestion (*supra*) that, in the relatively short time starting with the decision in *Linkletter*, the Court has advanced with perhaps too rapid a pace in moving towards a position of almost puristic Austinian "prospectivity", and that we believe we are correct in our critique *supra* of the Court's historical discussion of the Austinian theory in *Linkletter* (which was again referred to inferentially in *Stovall*—388 U.S. at p. 301) and in our various contentions *supra* which we believe favor applying *Katz* to this case as one still pending on direct review. We urge that

the *Stovall* "dictum" cannot be applied here, for all of those reasons.

We note also that the *Stovall* holding as such—aside from the "dictum" as to cases still pending on direct review—has recently been the subject of flexible re-interpretation (in favor of convicted persons) in *Pearson v. United States*, 5th Cir., January 12, 1968, 2 Criminal Law Reporter 2437; and in *Thompson v. State*, Okla. Ct. Crim. App., decided February 21, 1968, *ibid.*

**C. Additional Considerations Favoring A Ruling In This Case That The Katz Principle Is Applicable If Only Because This Case Is Still Pending On Direct Review.**

Under this sub-heading we collect for the Court's consideration a miscellany of items which may assist in arriving at a correct decision of the retroactivity issue.

1. It was noted in *Berger v. New York*, 388 U.S. 41, at pp. 47-48, fn. 4, that eight States, including New York, prohibit surreptitious eavesdropping by mechanical or electronic device, and that of those eight States all except Illinois permit official court-ordered eavesdropping of this type. See also *Elson v. Bowen*, S. Ct. Nev., December 20, 1967, 2 Criminal Law Reporter 2265, compelling a defendant FBI agent to testify in a civil action as to allegedly illegal electronic surveillance of a conversation in a Las Vegas hotel, involving the prohibitory legislation of Nevada, which is one of the eight States referred to in *Berger*. New York State's legislation which prohibits such bugging is *N.Y. Penal Law* §738. That provision was on New York's statute books long before the Waldorf-Astoria bugging in our case, which took place in December 1965. Denial of retroactive application of *Katz* in this case would neces-

sarily have the effect, in so many words, of condoning a defiance of the New York anti-bugging legislation. To our knowledge, no previous case of the "retroactivity" series of cases in this Court commencing with *Linkletter*, or any other decision of this Court or of any other Federal Court, has ever involved or contemplated such an offensive decisional result. It is undisputed that the agents in our case did not have a New York State judicial permissive order. While this issue has not been decisively operative in the litigation of the present case thus far, it would become an issue of immediate urgency on both constitutional and other policy levels if, now, notwithstanding *Katz*, this Court were to rule in our case that the Waldorf bugging was legal. The inevitable result of such a ruling would be to set at naught, through the paradox of denying *Katz* retroactivity and at the same time *retroactively* trampling down the New York legislation, New York State's own carefully planned system for preventing this very sort of electronic bugging without advance judicial permission. We may mention in this connection that, as we understand *Berger v. New York*, *supra*, this Court did not invalidate New York's *prohibitory* legislation in this area, but only its *ex parte* permissive court-order legislation.

2. The *Katz* case, in examining various constitutional foundations of the right of individual privacy which is protected against Fourth Amendment improprieties (see fn. 5 in *Katz*), apparently did not make mention of the Ninth Amendment of the Constitution. We have invoked the Ninth Amendment herein (Pet. Cert. p. 9). We respectfully suggest, therefore, that it is open to us to urge that *Katz* did not exhaust the entire roster of constitutional issues pertaining to allegedly non-trespassory electronic

room-bugging as raised by us herein, and that accordingly this case may be decided by this Court in our favor on an additional or independent point of constitutionality not governed by *Katz*; whereupon the conclusion could follow that our case does not indispensably depend, in any event, on a "retroactive" application of *Katz*.

3. In two recent decisions the Seventh Circuit has dealt with electronic eavesdrop situations in a manner plainly connoting that that Court deems *Katz* to be retroactively applicable in the fullest sense. *United States v. Hagarty*, C.A. 7, decided January 11, 1968 (opinion by Cummings, J.), 2 *Criminal Law Reporter* 2360; *United States v. White*, C.A. 7, decided March 18, 1968 (opinion by Schnackenberg, J.), 3 *Criminal Law Reporter* 2005.\*

4. See also the annotation in 10 A.L.R.3d 1371 ("Prospective Or Retroactive Operation Of Overruling Decision").

5. We call attention to the language of the *Katz* decision itself where the Court rejected the Government's argument that because its agents relied on *Olmstead v. United States*, 277 U.S. 438 and *Goldman v. United States*, 316 U.S. 129, the Court should retroactively validate their conduct, an argument to which the Court's succinct reply was, "That we cannot do. \* \* \* [T]he inescapable fact is that" the agents had chosen to decide for themselves, rather

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\* Cf. also *Dryden v. United States*, C.A. 5, decided March 22, 1968, 3 *Criminal Law Reporter* 2028, holding *Katz* inapplicable to telephone-extension eavesdropping (with informer's consent) but making no mention of any supposed difficulty of retroactive applicability of *Katz*. To similar effect is *Clark v. State*, Md. Ct. Spec. App., decided January 29, 1968, 2 *Criminal Law Reporter* 2404. Query, whether *Lee v. Florida*, No. 174 this Term in this Court, will affect the substantive rulings of the latter two telephone cases in relation to *Rathbun v. United States*, 355 U.S. 107.

than presenting to "a neutral magistrate", the agents' claimed belief that they had probable cause to conduct their electronic activity.

6. This case was originally set down for argument immediately following argument in *Lee v. Florida*, No. 174. The electronic eavesdrop issues in the two cases are not the same, since *Lee* involves the party-line type of telephone wiretapping, done by State police officers in investigating violation of state law, and our case (like *Katz*) involves allegedly "non-tresspassory" room bugging by Federal police investigating a Federal crime. However, the decision of both *Lee* and our case seemingly would be affected by the newly announced plenary Fourth Amendment principle of *Katz*, unless *Katz* is held inapplicable on grounds of non-retroactivity. The *Lee* monitoring took place (or commenced) in July 1963 (*Lee v. Florida*, No. 174 this Term, Petitioner's Appendix, pp. 12, 36); the Waldorf-Astoria bugging in our case was in December 1965. Although *Lee* presents the broad *Katz* Fourth Amendment issue in a factual setting of state action and telephone wiretapping, these very circumstances may well result in a renewed plenary formulation of the *Katz* Fourth Amendment principle when this Court hands down its decision in *Lee*. Should that happen, and had our case been argued with *Lee* as originally planned (so that the decision in our case could have been rendered not later than the decision in *Lee*), our petitioners may have become entitled to "non-retroactive" benefit from such a *Lee* decision. We intend no presumptuousness by broaching these speculations in a matter which lies so peculiarly within this Court's *in camera* province, but we are trying to discharge as fully as possible our responsibility as counsel to present in this brief a comprehensive treatment



on the important and as yet undecided issue of retroactivity *versus* prospectivity in applying decisions like *Katz* to other cases of electronic monitoring.

7. On April 22, 1968, the Court granted certiorari in *Kaiser v. New York*, No. 1451 Misc., presenting the issue of retroactivity of *Berger v. New York*, 388 U.S. 41.

## POINT II

A. Even if *Katz v. United States*, No. 35 this Term, is held inapplicable to this case on grounds of non-retroactivity, the Waldorf-Astoria electronic proofs have fatally tainted the case because, under pre-*Katz* standards, that electronic bugging was unconstitutional.

B. In any event, if the Waldorf bugging should be deemed on the present record not to exhibit violation of pre-*Katz* standards as petitioners contend, there is more than enough indication in the present record as to the dubiousness of the findings of the courts below which validated the Waldorf bugging as complying with pre-*Katz* standards, to require at the least a remand by this Court for a *de novo* and plenary hearing as to that bugging.

C. In any event also, it was error for the Court of Appeals to refuse to include, in its order for a remand hearing as to electronic eavesdropping, the subject matter of the Waldorf bugging, in view of the overall circumstances of the case which included belated disclosure by the Government of trespassory electronic surveillance in addition to the Waldorf incident, strong indications of untruthful testimony by narcotics agents in the pretrial Waldorf-bugging hearing, and other circumstances denoting obstructive or evasive conduct by the Government's representatives.

### **The Waldorf Astoria Eavesdropping; the Pretrial Hearing**

At a pretrial session on April 27, 1966 the Government advised that there had been electronic eavesdropping in this case—later identified as the Waldorf-Astoria incident (R. 3151 *et seq.*). This was the Government's first revelation of its electronic activities in this case. Upon inquiry by defense counsel the Government assured that the only eavesdropping of which it knew was in New York City, "there was none in Georgia, for example, there was none in Florida"; there was none "outside of the country"; and Government counsel further assured that he had examined the Narcotics Agents' reports before making these representations; indeed Government counsel during the pretrial colloquy here being described again checked privately, but in open Court, with the supervising Narcotics Agent, Fitzgerald, and then renewed the representation. (R. 3157-3161). The representation was renewed, under intensive colloquy-inquiry by the defense at another pretrial session about a month and a half later (Tr. June 8, 1966, pp. 259-260).

A pretrial hearing was held concerning the Government's revelations of having bugged Nebbia's room at the Waldorf. We contend that on the basis of that pretrial record, without more, the conclusion is required that the bugging of Nebbia's room was done in a manner which brings it within the ban of the pre-Katz cases against "trespassory" electronic eavesdropping. *Silverman v. United States*, 365 U.S. 505; *Clinton v. Virginia*, 377 U.S. 178.

. . . . .

At a later page we shall describe in detail, with citations to the record, the testimony and other proceedings at the pretrial hearing concerning the Waldorf-Astoria room-

bugging, but first we present the following introductory description and comment\* :—

The electronic installation at the Waldorf-Astoria Hotel which the Government states was used in this case\*\* was the attaching, by adhesive tape, of what is known as a multi-directional microphone to the bottom of the door in the agents' hotel room (Room 1600), there being a small aperture at the bottom of the door (about  $\frac{3}{8}$ "), and the microphone being tilted at an angle of forty-five degrees, i.e., tilted back in the direction of the agents' room in such a manner as to form a cup that would act as a collector of sound coming from underneath the door (see the photographic exhibits, Govt. Ex's 1, 2, 3, 4, in ev. at Tr. of June 7-8, 1966, p. 105). A wire ran from this microphone to a bathroom in the agents' room where the wire connected to what is known as a pre-amplifying device which in turn was connected to a tape recorder that also had an auditing device by which the agents could listen at the same time that the sound was being recorded on the tape.

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\* Our observations of a technological character in the following pages are based on Appendix B hereto, *infra*, an affidavit by the nationally noted electronic-voice-recording expert, Bernard B. Spindel. That affidavit was filed in the Court below shortly preceding the oral argument of the appeals from the convictions. As more fully indicated *infra*, important developments affecting the electronic eavesdrop issue in this case occurred during the pendency of the appeals. One of these developments was the then newly-emerged (November-December 1966) "Schipani-review" program, which we invoked in the Court of Appeals as requiring *de novo* exploration of both the Waldorf bug and any other electronic surveillance relating to this case. In our following presentation we try to keep a clear dividing line between record items preceding the appeals and those which originated in the record during the appeals.

\*\* *Infra* we note the facts which cast doubt on the truthfulness of the agents' description of how the Waldorf bugging was done.

It is important to note that the door in the agents' room to which the microphone was allegedly taped was *part, and part only*, of the separation between the two rooms. There was also, separated by a narrow space of only a very few inches from that door in the agents' room, a similar or identical door leading into Nebbia's room. In other words, the two rooms were separated by a double door with a narrow air space between them, a double door construction of the familiar type found in many hostels of the better class. This, in turn, means that between these two immediately adjoining doors the narrow air space which existed was *common* to each room and formed, so to say, a common *cushion* of an acoustic nature; and at the same time, and more significantly for present purposes, it formed, *when (but only when) electronically bugged from either room in the manner claimed by the Government itself, a common sound chamber.*

The particular method of multi-directional microphone electronic bugging which the Government itself asserts was used in relation to the double-door-air-space situation of the two adjoining rooms in question, amounted (on the Government's own factual representations, we repeat) to what electronic sound technicians commonly denominate as (using their various terminological synonyms)\* a form of "*intrusive*" electronic bugging employing the principle of the "tuned chamber", or "resonator tube", or "resonator chamber", or "tuned resonator", or "frequency cavity chamber" or—turning now to terminologies which may be more familiar in the contemporary lay vocabulary during the current era of heightened interest in electronic bugging—the principle of the "tubular microphone", or

\* See Appendix B hereto, *infra*.

"pipe microphone", or "shotgun microphone" or, what is probably the contemporaneously most familiar (and frightening) term of all of these, the principle of the "parabolic mike". That is to say, when a multi-directional microphone is taped to an aperture of a narrow airspace of the type here involved (the double door setup between the agents' and Nebbia's room) in the manner here done and at the angle of tilt here used, that microphone operating in combination with the narrow intervening airspace becomes a "parabolic mike" for the purpose of electronically bugging the adjoining room space, viz., Nebbia's Room at the Waldorf-Astoria.\*

All of our foregoing recitals, and remarks, concerning what we have termed the "parabolic mike" character of the installation at the Waldorf-Astoria, are based, we respectfully repeat, on the Government's own description of the physical facts of the installation. The decisive physical feature in this picture is the *double-door with narrow intervening airspace*. The supposedly identical or dispositively similar microphone installations in the hotel or motel rooms involved in *United States v. Pardo-Bolland*, 348 F. 2d 316 (C.A. 2, 1965), cert. denied 382 U.S. 944, did not involve *double doors (infra)*.

The classic pre-*Katz* expression by this Court in defense of room-privacy against electronic-eavesdrop intrusion where the latter is sought to be constitutionally condoned as being technically "non-trespassory", was made in *Silverman v. United States*, 365 U. S. 505, where the electronic buggers utilized, with what proved to be a constitutionally abortive intention of "non-trespassory" finesse, a mini-

\* See the last preceding footnote.



mally intrusive device for picking up what amounted to sound-chamber products in a heating duct system of the premises there involved. In the particular kind of double-door-with-narrow-intervening-airspace that is involved in our case, the airspace or sound-chamber is the equivalent, we suggest, both under the laws of physics and under the law of the United States Constitution (Fourth and Fifth Amendments), to the sound chamber, which in *Silverman* consisted of the heating duct system.\*

In short, the airspace between the double doors in our case had a necessary effect if not an express engineering purpose of creating an acoustical barrier or air cushion for the benefit of additional privacy for the Waldorf-Astoria's guests—so that such air space may properly be deemed to be part of the premises of Nebbia's room, and the Government's utilization of this air space in the particular bugging installation here claimed by the Government to have been used became in literal effect a perversion of the special privacy barrier, forming part of Nebbia's premises, into a means for directly invading his privacy.\*\*

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\* The case law of the pre-*Katz* standards is more fully discussed *infra*.

\*\* We are aware that similar reasoning as to privacy—invasion of a room-partition—could be urged in a case like *Pardo-Bolland, supra*, where a single door was used on the agents' side, or in a case like *Goldman v. United States*, 316 U. S. 129, where a "detectaphone" was placed against a common wall, said installations having been judicially approved (condoned might perhaps be the better word)—again, this was during the pre-*Katz* period. However, as developed in the text following this footnote, we are not aware that any argument was advanced in either of the latter pre-*Katz* cases along the lines here being suggested, namely, that where an apparently expressly designed acoustical barrier for *enhancement* of *single-door* or other *single-partition* privacy has been provided the deliberate perversion of such privacy barrier into an anti-privacy device presents a pre-*Katz* Fourth Amendment issue. As a matter of fact, this form of intrusion into an

We have examined the record and briefs in the Court of Appeals in *Pardo-Bolland*, *supra*, and the certiorari papers in that case, and it does not appear that any argument or analysis along the lines here being suggested was advanced. In the petition for certiorari in *Pardo-Bolland* (p. 6), it was merely stated, conclusorily and without demonstration, that the microphone taped to the agents' side of the door between the two rooms was "an unauthorized physical penetration into the premises occupied by" Mr. Pardo-Bolland, within the meaning of the *Silverman* case; and it was suggested that an engineer with calipers or a micrometer might be needed to determine the depth or degree of penetration, "fractions of inches" being urged as having no significance in view of the *Silverman* case. Our position here does not depend upon demonstrating any "physical penetration" in the conventional sense,\* as was futilely attempted to be shown in *Pardo-Bolland*; our position depends rather upon a specific analysis of the electronic and acoustical circumstances which we say here point to an unauthorized invasion of an integral part of Nebbia's private "close", namely, his acoustical privacy-barrier provided by the double door arrangement with air-space in between.

One factual feature which is common to *Pardo-Bolland* and to our case is that in both cases the hotel management secretly cooperated with the Government agents to enable

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acoustical air space barrier actually makes for a pronouncedly more efficient electronic eavesdrop, with the type of device that the Government says it here used, than is true in cases like *Pardo-Bolland* and *Goldman* where only a single door or single wall partition is involved. See Appendix B to this brief, *infra*, the affidavit of our electronic consultant, Bernard B. Spindel.

\* The *pre-Katz* problem of "physical penetration", or of "trespass", is further noted under the concluding subheading of this Point II, p. 118, *infra*.

the latter to breach the privacy of the respective hotel guests' rooms. However, the record, briefs and certiorari papers in *Pardo-Bolland* do not indicate that this circumstance was raised or that it entered into the consideration or decision of the case. See our description *infra* of the pertinent record items herein which bear upon the actions of the Waldorf-Astoria Hotel management in cooperating secretly with the agents for the purpose of depriving Nebbia of the privacy of his hotel room. If the Fourth Amendment, as we take it is unquestionable, expressed already pre-*Katz* a historical-social policy in favor of certain minimum civilized standards of decency in regard to attempted invasions of the constitutionally protected right of individual privacy, this sort of stealthy and conspiratorial plotting between secret police investigators and a man's trusted hotel host, surely calls for Fourth Amendment scrutiny on pre-*Katz* standards. Cf. Mr. Chief Justice Warren's concurring opinion in *Lopez v. United States*, 373 U. S. 427, 444, where similar instances of breach of trust or confidence are referred to in disapproving terms; and cf. also the statement of the Government's counsel in the oral argument of *Hoffa v. United States*, 385 U. S. 293, that while the Government conceded "no difference under the Fourth Amendment" as regards the question of closeness or trust in confiding one's secrets to another person, "perhaps there is a due process difference. There is a point—and [Chief Justice Warren's] concurring opinion in *Lopez* suggests—where closeness will affect due process." 35 U.S. Law Week 3136. This Court's decision in *Hoffa* specifically notes that "it is obvious that petitioner was not relying on the security of his hotel suite when he made the incriminating statements to Partin [Hoffa's supposed close friend and associate] or in Partin's

presence. Partin did not enter the suite by force or by stealth. *He was not a surreptitious eavesdropper.* \* \* \* The petitioner, in a word, was not relying on the security of the hotel, he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing. \* \* \*. (Emphasis added) The contrasting facts of the surreptitious electronic snooping in our case need not be elaborated.

Let us now examine more closely some of the pertinent details of the Waldorf-Astoria eavesdrop.\*

First, as to the sheer question of whether the agents told the truth at all about the physical facts of their Waldorf bug installation:—In the pretrial hearing Narcotics Agent Durham described the Waldorf eavesdrop equipment as consisting of “a dynamic microphone made by Shure Brothers, known as a Model MC-11-J. It has an impedance of approximately 1700 ohms, and is matched precisely with this Concord Model No. 330 tape recorder and an amplifier that I personally had assembled here.” (Tr. May 4, 1966, pp. 5-6). Durham also explained that the amplifier would act as a pre-amplified to boost the power of the tape recorder when the eavesdropped sound signal dropped to a volume level too low to record normally on the tape recorder (*id.*, p. 6); that the Concord tape recorder operated either from its own battery pack or from room current\*\* (*ibid.*); and,

\* References *infra* to Appendix B of this brief may be of special interest to the Court because said item is the previously mentioned detailed technological affidavit by Bernard B. Spindel, generally acknowledged to be the leading expert in this country on electronic eavesdropping techniques.

\*\* See our Question Presented, No. 3, subd. (c), *supra*. Both Durham and Agent Kiere later testified that the apparatus had been operated on the hotel current (Tr. of May 4, 1966, pp. 9-10; June 7-8, 1966, p. 108). We return to this topic *infra*.

referring to the manner in which the microphone was placed and taped at the bottom of the door, that "By using this tape thusly (indicating) it becomes somewhat a collector of sound, directing the sound into the microphone itself" (*id.*, p. 7).

See our motion in the Court of Appeals filed January 4, 1967, where it is shown in the affidavit of Bernard B. Spindel (Appendix B hereto, *infra*) that the Shure Brothers microphone model MC 11 J which Agent Durham says was used is a low impedance microphone of only 1000 ohms, not the 1700 ohms stated by Agent Durham which would be a "high impedance" unit; that these facts are objectively demonstrable from standard catalogue materials; that the MC 11 J microphone would absolutely not have "matched precisely with this Concord model no. 330 tape recorder" which Durham said he used; that the pre-amplifier mentioned by Agent Durham would have been absolutely indispensable on the basis of *constant* operation to get any results at all, which in turn leads to the difficulty that the agents' testimony is that the pre-amplifier was not used constantly; that it is difficult if not impossible for the installation described by Durham to have worked, *pointing to the strongest likelihood that a quite different installation was used, of a type which almost surely would have entailed a physical intrusion or "trespass" into Nebbia's room*; that in any event a multi-directional microphone thus placed and taped to focus upon sound received through the air space between the two doors becomes a "parabolic mike"; that despite the taping (and despite muffling by a cloth towel also mentioned by Durham —Tr. of May 4, 1966, p. 8) the type of microphone here assertedly used would inevitably also pick up sound in the agents' room. We indicate, *infra* the extremely interesting



significance of this latter problem of the picking up of sound in the agents' room.

Further, Agent Kiere, who had operated the Waldorf-Astoria eavesdrop machinery, said that it was necessary to regulate the volume of the pre-amplifier in the bathroom, saying, "This was rather critical because of the closeness of the microphone and occasionally there would be a feedback effect with a high piercing screech, where I would have to lower the volume" (*id.*, p. 10). Agent Durham said he had instructed Kiere to use the pre-amplifier only when necessary to improve audibility, "so that you don't overload the entire circuit" (*id.*, p. 16). Durham also said that there was a voice actuated function in the equipment which would actuate the tape recorder at times when such might not be desired (*id.*, p. 20).

The items mentioned in the above three paragraphs give rise to additional problems which we pointed out to the Court of Appeals (Appendix B, *infra*, affidavit of Mr. Spindel): Was the use of the common hotel current in the nature of an invasion of a "common appurtenance" for the purpose of electronic spying on Nebbia, and is such constitutional? Could the equipment work at all when the pre-amplifier was not turned on? Did the feedback screech, which would presumably issue from the microphone, constitute an invasion of the air space between the two rooms or of the air space in Nebbia's own room such as might incur the pre-Katz constitutional ban against a physically intrusive factor occurring in the course of the electronic eavesdropping? Did the existence of the voice-actuated function necessarily subject the tape recorder to reception of far more sound from the Agents' own room than the

tapes actually reveal, and, if so was the microphone actually in the Agents' room at all, or must it have been inside Nebbia's room? These and other disturbing matters (*infra*) casting doubt on the Government's representations about the Waldorf bug were unavailingly urged before the Court of Appeals as at least justifying a remand for a further hearing on the Waldorf activity.

The items next to be mentioned are especially distressing in their indications that not all of the Government's witnesses have thus far told the truth about the Waldorf bug installation.

Agent Durham testified (pretrial hearing of June 7-8, 1966) that Agent Kiere told him that the door to which Durham later attached the microphone was a *connecting door* to the next room; Durham said he assumed that this door *opened into Nebbia's room* because of what Kiere had told him (Tr. June 7-8, 1966, pp. 98-99). Despite this testimony of Durham that he assumed from what Kiere had told him that the door on which he attached the microphone opened into Nebbia's room, he later also said, "It was my understanding there were two doors"; he was then asked who informed him of this, and he replied (note the guarded resort to "best recollection"), "Again, to the best of my recollection, I believe Agent Kiere" (*id.*, 108-109). This theme was further pursued (*id.*, 109-112):

"Q. Agent Durham, this door under which you placed the microphone, did you know if there was another door similar to that on the other side opening to 1602? A. Not from personal knowledge, no, sir.

Q. Who told you that? A. I believe Agent Kiere.

Q. Did he say that he had opened the door from 1600 to examine the other door? A. He did not.

Q. Do you know if he did? A. I did not know that, no, sir.

Q. Did you see any plans to know how far apart the two doors were? A. No, sir."

. . .

"Q. Now, did you look through the air space? Did you look through that space? A. No, sir, I did not.

Q. Did you examine that space at all? A. No, sir.

Q. Did you check to see if that air space was clear to the next room? A. No, sir, I did not.

Q. Did anybody tell you whether or not that air space was clear to the next room? A. No, sir, they did not.

Q. In other words, there could have been a solid wall on the other side of that with no air space, as far as you knew, is that correct? A. Judging by the performance of the equipment I used it would be my opinion that there was not a wall.

Q. In other words, you only checked it by testing the equipment, is that correct? A. That's correct, sir."

Most interesting, in view of Durham's thus having tried to shield from discovery that any agents had opened the door on the agents' side which led to the door to Nebbia's room, is the fact that all or nearly all of the agents who testified at the hearing, except the very guarded Mr. Durham, freely admitted that they had opened the door on the agents' side of the double door arrangement. Kiere so admitted (*id.* 131). Likewise Agent Klempner, who indeed stated that the door was opened in the presence of a representative of the hotel management (*id.* 240-241). Agent Walter J. Smith said that he opened the agents' door and

observed that there was no handle on the door leading directly into Nebbia's room (*id.*, 203); Smith said also that other agents had opened the door, including *Durham himself*, Kiere, Weinberg and Klempner (*id.* 217-219); Smith said he put his ear to the inner door (Nebbia's door) but could not hear anything (*id.* 204-205, 209-210).

Thus, Smith's testimony contradicts that of Durham, the installation expert who swore he had not opened and had not been present at any opening of the door and had no idea as to the physical construction of the arrangement or the air space in between.

It taxes credulity that Durham, supposedly an experienced electronics surveillance agent, would make this important installation with the naive lack of knowledge of the physical facts as claimed by him at this hearing.\* The logical inference is that, if Agent Durham was evidently so bent upon concealing the technical details of what he had done, he may well have been trying to hide something which should not legally have been done. It is very difficult to avoid the conclusion that Agent Durham has not told the entire truth, and that a grave question persists as to just what in truth was the nature of the electronic installation. Cf. the intriguing testimony of former Agent Weinberg, who swore that he had seen no electronic apparatus in the agents' room at all (*id.*, 263, 265-267).\*\*

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\* See the Spindel affidavit (p.A10) in our Appendix B, *infra*, stating: "As an expert in this field \* \* \* it is incredible to me that any other qualified expert in the field would go about making an installation of this type on the basis of the lack of knowledge of the physical set up as stated by Agent Durham."

\*\* Might this be because the equipment was *elsewhere*; and because its linkage was with a "trespassory" installation inside or penetrating Nebbia's room?

We previously referred to the absence from the tapes of certain kinds of extraneous noises which should have been audible on the tapes if the agents were telling the truth about the method of electronic installation by which the tapes were obtained. As seen, the agents' testimony was that the microphone used was of the multi-directional type, and that the installation was equipped with a voice-actuated function which would cause the equipment to go into recording operation when a certain minimum volume of sound occurred. In other words, this was a microphone which would just as (or more) sensitively pick up sounds in the agents' own room (where indeed the sources of sound were nearer and more open to the microphone) as in Nebbia's room; and with the voice actuated function being installed in this apparatus, there should have been heard on the tapes a substantial amount of sound coming from the agents' own room; indeed, there should have been numerous really prominent passages of sound coming from the agents' room, because there was quite a bit of sound-producing activity going on in that room, including extensive use of a typewriter by Kiere (R. 685, 855-860), a very actively used portable shortwave radio for constant communication with surveillance agents (R. 970-976—the "whole room could hear it" (R. 976)), the ringing and dialing of telephones and voices speaking on the telephone (R. 495-595), the playing of already recorded tapes (R. 693, 702-704) and, presumably, the various conversations among the agents in the room. Yet, by some apparently inexplicable magic this sensitive multi-directional microphone seems to have missed picking up any perceptible amount of all of the above enumerated categories of notable intra-room noise in the agents' own room. Nor can the explanation lie in the fact



that one of the tapes had been processed for elimination of background noise, because, we may inform this Court, the unprocessed tapes sounded, if anything, freer of any such extraneous noise than the processed tape.

Of course, there is one completely logical explanation of how it could have happened that this highly sensitive multi-directional microphone failed to hear practically any of the numerous and strikingly obtrusive noises that it should have heard in the agents' room, and this explanation would be that the microphone was not in the agents' room, but was in Nebbia's room. The Government has never given a satisfactory explanation of the puzzle as to why the Narcotics Bureau's microphone was so prejudiced against listening to typewriters, blaring radios, clanging telephone bells, etc., in the agents' room and was so much more receptive to listening to voices in Nebbia's room.\*

As to the conduct of the hotel management in betraying Nebbia's privacy, Agent Kiere testified that Mr. Whiteman, of the Waldorf-Astoria staff, had told him that Room 1602 was the room which was to be "electronically surveyed" (*id.*, 124). Agent Shrier said he had no knowledge of anyone in the Narcotics Bureau asking the Waldorf-Astoria to assign Nebbia to a particular room (*id.*, 253). But the district court prevented defense counsel from questioning other agents about this (Tr. June 7-8, 1966, pp. 128-129, 135-136, 215-217). Mr. Whiteman testified that the agents had requested a room as close as possible to Nebbia's room (*id.*, 151-152); he did not know whether any other hotel personnel

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\* We are aware that Agent Kiere drew attention to one or two instances of telephone noise or human voices which he thought might have come from the agents' room, but these instances are *de minimis* in relation to the size of the problem which we think the Government faces in answering the above question.

had additional information about the circumstances of the renting of the two rooms involved (*id.*, 152); he did not have the hotel records pertaining to the renting of Nebbia's room, stating that the Government had taken those records (*id.*, 142); other records, which might have thrown light on the circumstances, had been destroyed (*id.*, 155-156).

At the conclusion of the Waldorf-Astoria eavesdrop pre-trial hearing the Trial Judge denied the defense motion to suppress on the ground that no trespass or other illegality had been shown (Transcript of June 7-8, 1966, pp. 270-275); all of the defendants had joined in the motion to suppress (*id.*, 275).

At the trial the Waldorf Astoria eavesdrop evidence was introduced over defense objections, as previously noted.

As mentioned in the footnote on page 91, *supra*, there were new developments after the appeals were taken from the convictions herein (the defendants were sentenced August 30, 1966 (18a-19a) and the appeals were argued January 19, 1967). Those new developments were (1) that in November-December 1966 the "Schipani" electronic-eavesdrop administrative review procedure was announced by the Department of Justice, and (2) that in counsels' relatively more leisurely re-study of the trial record in preparation for the appeals we obtained what seemed to us important new insights into the circumstances of the Waldorf bugging as revealed in the transcript of the pre-trial hearing above discussed. Accordingly, we included in the appeal briefs, and we urged in the argument of the appeals, all of the above noted matters pointing to the suspiciousness of the agents' claims of how the Waldorf

bugging was done, and we asked the Court of Appeals also to assist in a "Schipani"-type re-exploration of the Waldorf bugging notwithstanding that there had already been a pretrial hearing on that subject and that the bugging had been approved as constitutional. In these requests to the Court of Appeals we specifically raised the points noted *supra* as to the "parabolic mike" character of the Waldorf bugging as rendering that activity unconstitutional under then-applicable (pre-*Katz*) standards, and we emphasized the suspicious conduct of the agents as a significant factor favoring "Schipani" re-examination. Indeed we believe it is correct to say that the substance of the entirety of our presentation in the preceding pages of this Point II was before the Court of Appeals at the time of the oral argument on January 19, 1967, *via* the appellants' printed briefs plus extensive written motion papers (See the "Motion for Permission for Electronic Consultant to Listen to And to Inspect Tape Recordings" filed by appellants in the Court of Appeals January 4, 1967; and the "Motion for Supervisory Orders re Electronic Eavesdropping Issues etc." filed by appellants in the Court of Appeals on or about January 11, 1967; and see the listing of twenty-seven roman-numbered items in the joint petition for certiorari herein at pp. 13-18).\*

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\* All of these motions and applications of ours in the Court of Appeals were denied except for the granting of a remand hearing on electronic monitoring which excluded the Waldorf-Astoria bugging. Above all it would have been valuable to grant the motion for permission for Mr. Spindel to listen to the tapes, because he stated in his affidavit (App. B, *infra*, pp. A14-A17) that such listening could disclose whether a trespassory "parabolic mike" functioning had occurred (*id.* pp. A14-A15), and further whether an outright physically trespassory installation had been used; this latter, Mr. Spindel stated, could be determined by testing the tapes for extraneous sound and with an "oscilloscope" (*id.*, pp. A15-A17).

After the argument of the appeals in the Court below (January 19, 1967) there were additional pertinent developments in that Court revealing that the Government had not made full disclosure of its electronic eavesdropping activities relating to this case. This subject is treated in detail under our next subheading.

### **The Government's Reluctance to Make Disclosure**

From the time of the Trial Judge's denial of the motion to suppress, and thereafter throughout the trial and down to the eve of the perfecting of the appeals in the Court of Appeals, defense counsel had been proceeding on the Government's assurances, as above noted, that the Waldorf-Astoria eavesdrop had been carried out in the manner described by the Government's agents (non-trespassorily), and that there had been no other electric monitoring.

Then, as above mentioned, in the briefs of the appellants in the Court of Appeals, filed in December 1966, after the "Schipani" development and after counsel had had an opportunity to reexamine the record in the comparative leisure of preparing the appeal, we reopened the question of the acceptability of the Government's factual description of the Waldorf monitoring techniques. As our suspicions became more and more aroused, we followed our beliefs in the Court of Appeals with the above mentioned motion papers filed shortly before the oral argument of the appeals in which we requested "*Schipani*-type" review on a *de novo* and comprehensive basis to find out what the Government had actually done by way of electronic monitoring in this case\* (see, in the Court below, the brief for

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\* We also raised at that juncture the question of the effect of President Johnson's order of June 30, 1965, discussed under a separate subheading at pp. 114 et seq., *infra*.

appellant Nebbia, pp. 9-37; the brief for appellants Dioguardi and Sutera, pp. 5-8; and the previously mentioned appellants' motions filed, respectively, on January 4 and 11, 1967, prior to oral argument, which was held January 19, 1967).

In those papers which we filed in the Court of Appeals in December 1966 and January 1967 we did not expressly contend, as we were not then in a position to do so, that additional electronic monitoring had occurred, but we did suggest the possibility and requested further inquiry on the Government's part. Despite these inquiries and challenges with which we kept barraging the Government at that juncture of the appeals, the Government made no mention of any other electronic monitoring in the several papers which it filed during that stage of the appeals or in its oral argument on January 19, 1967 (see the Government's printed Brief On Appeal filed shortly before the oral argument of January 19, 1967, its affidavits of January 5 and 19, 1967 and its letter to the Panel dated February 15, 1967). Indeed, in his letter of February 15, 1967, the United States Attorney stated that "the *Schipani* review procedure was undertaken with regard to this case and no notification has been made to this Court because our inquiry has produced no information within the scope of *Schipani v. United States*".

The next pertinent item, chronologically, was our "Motion For Permission To File Supplemental Statement For Appellants After Oral Argument", supported by affidavit of Abraham Glasser sworn to March 27, 1967. In that motion we asked the Court of Appeals to consider whether the United States Attorney's letter of February 15, 1967 (*supra*)



was a satisfactory response to the "Schipani" problems that had been posed to the Government in this case. (In our latter motion of March 27, 1967 we referred also to communications which had taken place between Mr. Glasser and the McClellan Committee concerning President Johnson's order of June 30, 1965; we shall return to this subject *infra*).\*

The next pertinent development was a letter of April 18, 1967 from Mr. Fusaro, the Clerk of the Court of Appeals, requesting the United States Attorney to clarify his letter of February 15, 1967 (*supra*).

The next development was a letter to the Clerk of the Court of Appeals from the United States Attorney dated April 27, 1967, replying to the Clerk's letter of April 18 just mentioned, and stating insofar as here pertinent, as follows:

"I am in receipt of your letter of April 18, 1967 regarding the above matter.

In *Granello v. United States*, No. 750, this Term, *cert. denied*, April 24, 1967, the Department of Justice stated to the Supreme Court, in its brief at p. 19, n. 12 in opposition to the petitions for certiorari (copies of which are enclosed for the panel), that it believes its duty to disclose turns on whether something that is arguably material has been discovered. However, in view of the court's specific question, please advise the panel of the following: 1) there was no trespass committed in the monitoring litigated at the trial and at issue on appeal; 2) the review undertaken by the Department of Justice in this case pursuant to the policy enunciated in the Schipani Memorandum revealed two additional instances of electronic monitoring.

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\* See the last preceding footnote.

a) On December 18, 1965, in Columbus, Georgia, agents of the Bureau of Narcotics installed an electronic listening device in an automobile prior to its rental by Jean Nebbia. The device did not work and no conversations were overheard or recorded. This office was not aware of the installation of this device at the time of the trial below.

b) Between April 25, 1962 and April 1, 1963 agents of the Federal Bureau of Investigation installed, by trespass, an electronic listening device in the business establishment in Miami, Florida of an individual having no connection with the instant case. In 1962, two and a half years before the inception of the conspiracy, defendant Frank Dioguardi was overheard as a participant in two conversations at said establishment. Logs reflecting the content of these conversations are available and show that none of the conversations related in any manner to this case. Neither the existence of the surveillance nor any information overheard was communicated to the Bureau of Narcotics or to Government counsel who prosecuted the case."

The next pertinent development was a letter (of 30 pages) to the Clerk of the Court of Appeals, dated May 1, 1967, by appellants' counsel Abraham Glasser, tracing the history of the Government's obstructions and evasions in making disclosures of its electronic eavesdropping activities, and again requesting a further electronic hearing. A copy of said letter is printed herewith as Appendix C, *infra*.\*

Thereafter, on May 29, 1967, the Court of Appeals remanded the case to the District Judge for a hearing limited

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\* This Appendix C item of ours is believed to be of special importance, for the reasons indicated in the text above. We respectfully ask leave to have our Appendix C incorporated as part of our argument in this Point II.

to the two instances of trespassory electronic eavesdropping first disclosed in the United States Attorney's letter of April 27, 1967, above quoted; and when, after this, defense counsel moved for amendment of the remand order of May 29, 1967 for enlargement of the remand to cover any and all electronic eavesdropping of any kind which may have related to this case, including the Waldorf-Astoria eavesdropping, the Court of Appeals enlarged the remand order (June 14, 1967) as prayed, but excluding the Waldorf-Astoria phase.

There was then held, during June and July 1967, the remand hearing (before Judge Palmieri). These remand proceedings were rather voluminous, but we respectfully contend that they were inadequate and that petitioners did not receive a fair due process hearing as to the Government's overall electronic activities in this case.

Against the background of obstructiveness by the Government we should have been granted the most plenary procedural facilities in the remand hearing. Specifically, the Government should have been required to submit its officers and records to unstinting examination. Instead, despite the *apparent* thoroughness of the remand proceeding, we were cut off from any real opportunity to probe the conclusory, self-serving, "proof" of the Government denying "materiality" as to the two newly admitted trespassory buggings.

The District Judge concluded that the Georgia automobile bug had not functioned to produce any coherent evidence, and that the Florida bug had produced nothing relevant to this case (Pet. Cert., App. B, pp. 33a et seq.). The Court of Appeals in its opinion affirming the convictions, sum-

marized the latter conclusions of the District Judge, noted merely that defendants attacked those conclusions "on various grounds," and added merely "We have considered them all and do not find them persuasive" (Pet. Cert., App. A, at p. 24a).

We print as Appendix D to this brief, *infra*, a copy of the "Brief For Appellants After Remand Hearing *Re* Electronic Surveillance", which we filed in the Court of Appeals and which contains our detailed grounds for urging that the remand hearing had been procedurally unjust and indeed abortive.\* (The latter brief, Appendix D *infra*, contains references to a brief which we had filed before District Judge Palmieri after the remand hearing; we believe that our Appendix D item, *infra*, is self-sufficient

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\* The Government's obstructiveness in the remand hearing (tolerated by the District Court and unredressed by the Court of Appeals—all of which is fully described in Appendix D, *infra*) paralyzed our efforts to find out whether in truth nothing was overheard in the admittedly trespassory Georgia car bug or, more important, whether other buggings took place in Georgia. In the circumstances of this case—the Federal Narcotics Bureau's "all-time" "biggest" case, where the Bureau spared neither manpower nor technological exertions—it is practically incredible that no other bugging was done in Georgia. It is especially incredible that the Bureau did not bug Desist's room or tap his telephone at the Black Angus Motel in Columbus, Georgia; or that it did not bug Herman Conder at his home or at the Army Base in Georgia where he was stationed. But we were effectively blocked from exploring these prime probabilities at the remand hearing (again, all of this is thoroughly set forth in Appendix D, *infra*). The constitutional offensiveness of this obstructing of our efforts in the remand hearing is aggravated almost inexpressibly when one reflects that if the Government had not waited *until after the appeals from the convictions were argued* to disclose the "Schipani" car bugging in Georgia, i.e., if instead the Government had disclosed this before or during the trial (as was its duty), we surely could not have been thus obstructed in our questioning of the Agents or in subpoenaing other Government officials at the trial for a plenary exploration of the total actual Georgia bugging activity which we were blocked from effectively exploring at the belated mid-appeal remand hearing.

for present purposes without our also burdening the Court with a reprint of the brief before Judge Palmieri.)

We respectfully ask leave to have said Appendix D incorporated as part of our argument in this Point II.

At the very least, this Court should reverse to remand the case for a proper plenary hearing in which the Government may be compelled to make real disclosure, not merely a bureaucratic semblance of "disclosure".

Aside from the questions of the adequacy of the remand hearing as to electronic monitoring other than the Waldorf bugging, there persists the question of a new Waldorf hearing. In view of all of the foregoing it is difficult to understand the Court of Appeals' refusal to reopen the Waldorf-Astoria hearing. That refusal is in itself a ground for reversal here. The interests of both the Constitution and of standards of decency demanded a reopening of that hearing upon the showing which we made to the Court of Appeals as above described. To have denied such reopening either on the idea that the previous Waldorf-Astoria hearing had "adequately explored" the question of "trespass", or on the idea that we had already had one chance to convince a District Court Judge and must now resign ourselves, was to apply to the resolution of this profoundly important question of constitutional right and public morality too petty a standard of Federal appellate judicialty.

But even if relief is not to be forthcoming here to redress our claim of injustice in the refusal of the Court of Appeals to reopen the Waldorf-Astoria phase, the facts above summarized in regard to the Waldorf-Astoria bugging are be-



lieved to have afforded easily sufficient grounds for the Court of Appeals to conclude that, *on the existing record*, and on the then-existing (pre-*Katz*) standards, it was the duty of Federal appellate Judges to reject the District Court's finding of "no trespass" at the Waldorf-Astoria. And this Court can and should reject that finding, either on the grounds of the non-credibility of the agents' testimony, or on the grounds of acoustical and electronic science imported into this case by the presence of the double-door factor, or on the ground of the agents' admissions as to actual physical invasion of Nebbia's private air space in preparing for the electronic installation, or on the ground of the agents' use of the common electric current and wiring system to perpetrate an electronic invasion of privacy,\* or on the ground of connivance with the hotel management to betray the privacy of a paying guest, or on all of these and the other grounds which seem to us to be favored by the record herein and by the *Silverman* case policy of refusal to tolerate "trespass" or physical intrusion "by even so much as a fraction of an inch".\*\*

#### **President Johnson's Order of June 30, 1965**

In both of the Courts below we urged that if the Waldorf-Astoria bugging was done in defiance of a Presidential order it was unconstitutional because *ultra vires*.

The Solicitor General has alluded in papers filed by him in this Court, to a "policy" or "policies declared by the

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\* Let police electronic snoopers at least be put to the necessity henceforth of using their own battery packs—such would be in accordance with pre-*Katz* standards.

\*\* See, again, the further discussion of the pre-*Katz* "trespass" doctrine under the concluding subheading of this Point II, p. 118, *infra*.

President on June 30, 1965, for the entire Federal establishment" which "prohibits such electronic surveillance or the use of such listening devices (as well as the interception of telephone and other wireless communication) in all instances other than those involving the collection of intelligence affecting the national security". These words appear in two documents entitled "Supplemental Memorandum for the United States", one filed in *Black v. United States*, no. 1029, October Term 1965, at pp. 3-4; and the other filed in *Schipani v. United States*, No. 504, October Term 1966, at p. 4. In the *Black* memorandum the Solicitor General further said, "The specific authorization of the Attorney General must be obtained in each instance when this exception [national security] is invoked" (p. 4). In the *Schipani* memorandum the Solicitor General further stated that "such [national security] intelligence data will not be made available for prosecutorial purposes, and the specific authorization of the Attorney General must be obtained in each instance when the national security exception is sought to be invoked" (p. 4).

Counsel for the within petitioners endeavored during the appeals herein to find out from the Department of Justice in Washington what are the *exact textual* provisions of the above mentioned Presidential declaration of policy of June 30, 1965, but we have not been given an answer.

The reason why it is important for the purposes of the pre-*Katz* issues in this case (which we are arguing in this Point II), to find out if possible the exact terms of the President's policy statement of June 30, 1965, is that it is not clear from the Solicitor General's above mentioned memoranda in *Black* and *Schipani* whether the forms of

electronic surveillance prohibited by the President are specifically described in relation to "trespassory" *versus* "non-trespassory" types; or whether they are described in terms of legality or illegality as laid down in any specific Court decisions; or whether the President has prohibited all forms of electronic surveillance.

One thing, however, is manifest without further inquiry. If the Waldorf-Astoria electronic surveillance done in the present case comes within the ban of the President's statement of June 30, 1965, it must follow as the night the day that the within judgments of conviction must be reversed. For it is unthinkable that any person should be convicted and imprisoned on evidence obtained by Federal Police in express violation of a prohibition by the President of the United States and the Attorney General. The Government has conceded that the electronic bugging of Nebbia's hotel room in this case was not done with any authority or permission from the President or the Attorney General, but was done solely on the authority of the District Supervisor of the Federal Bureau of Narcotics, Mr. George M. Belk (R. 497-498). And, as seen, the Waldorf bugging here involved post-dated the President's order of prohibition by nearly six months.

Absent a valid applicable statute of Congress, can there be any question that no officer or employee of any of the "executive departments" of the Federal Government may act in exercise of *executive power* in defiance of a presidential prohibition? The point is so elementary and so axiomatic as a matter of constitutional doctrine that it seems ingenuous to emphasize it; this Court has several times had occasion to refer to the President's intrinsic supremacy.

over the executive departments through which he acts and which are merely his agents. "Executive power, in the main, must, of necessity, be exercised by the President through the various departments. These departments constitute his peculiar and intimate agencies \* \* \*". *Russell Motor Car Co. v. United States*, 261 U.S. 514, 523. "The heads of departments are his authorized assistants in the performance of his executive duties \* \* \*" (*Runkle v. United States*, 122 U.S. 543). What should be perceived then, when any Federal law enforcement official disobeys a prohibition of the President, without valid statutory warrant for such disobedience, is that the offending officer is simply acting *ultra vires*. Once attention is focused upon this feature of *ultra vires* in such a situation, it becomes apparent immediately that the disobedient conduct of the offending Federal police officer visits, upon any person aggrievingly touched by that disobedient conduct, a denial of due process of law in the most literal and classic sense of these words. "Process of law" is "due" only when it is in accordance with "law". If it is without "law", or against "law", then *eo ipse* it is not "due process of law". Electronic surveillance done by a Federal police officer in defiance of a direct prohibition of the President of the United States is the act of a usurper. No "process" endured at the hands of a governmental usurper can ever be "due process".

The Court below refused our request to compel the Government to disclose the text of the President's order. This Court should apply its hand for this purpose.\*

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\* See the typewritten "Supplemental Brief for Appellants", filed in the Court of Appeals January 25, 1967, after the argument of the appeals (mainly devoted to the subject of the Presidential order). If this item is not in the certified record in this Court (see p. 1, *supra*, fn.) we shall tender a certified copy to the Clerk. See also Appendix C hereto, *infra*, at pp. A40-A45, discussing the Presidential order.

**Conclusion to Point II: The Need to Avoid an Oversimplified View of the Pre-Katz Standards Concerning "Trespass" *Vel Non*; the Quite Possibly Dispositive Effect of the Pre-Katz Decision in *Osborn v. United States*, 385 U.S. 323**

We realize that the widely held view concerning the pre-Katz Federal case law on electronic eavesdropping—aside from the cases outlawing telephone wiretapping by reason of 49 U.S.C. § 605—is that if there has been a physical trespass in the property-law sense, the Courts will exclude the eavesdrop evidence, and not otherwise. Both of the Courts below applied this strict "trespass" view in the present case. This supposed posture of the pre-Katz case law is an over-simplification. The situation became considerably complicated by the *Silverman* decision, where the controlling opinion, by Mr. Justice Stewart, conspicuously refrained from grounding the decision on any technical physical trespass considerations, and formulated the matter instead in the more meaningful language of "an actual intrusion into a constitutionally protected area" (365 U.S. 505, 512).<sup>\*</sup> In *Lopez v. United States*, 373 U.S. 427, 461, Mr. Justice Brennan in dissent (joined by Justices Douglas and Goldberg), flatly stated, without contradiction from his majority Brethren, that in *Silverman* the Court had " \* \* \* expressly held \* \* \* that an actual trespass need not be shown in order to support a violation of the Fourth Amendment. \* \* \*". Nor, to our knowledge, has any member of the Court since the decision in *Lopez* (which was in May 1963), taken issue with Mr. Justice Brennan's enunciation of the meaning of the *Silverman* ruling. We therefore respectfully urge that

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<sup>\*</sup> It is true that Justices Clark and Whittaker, concurring in the Majority opinion, in *Silverman*, spoke of the Majority's formulation as amounting to a finding of "sufficient trespass" (365 U.S. at 513); but that is not what the Majority opinion says.



the Court is free, under the applicable pre-*Katz* decisions, to decide the pre-*Katz* issue of Fourth Amendment eavesdrop constitutionality in our case without feeling compelled to confine its decisional choices within the Procrustean alternatives of "trespass" versus "no trespass." And if it be said that the Court's freedom of wise judicial choice in deciding our eavesdrop issue is circumscribed by *Pardo-Bolland*, *supra*, i.e., by the fact that the Court denied certiorari in that case, our answer is that—aside from the well-known fact that denial of certiorari does not express the Court's affirmative view on any issue involved—*Pardo-Bolland* did not have the double-door factor (with all of the attendant Fourth Amendment connotations previously suggested) which was present in the scene of the *Nebbia* Waldorf-Astoria eavesdrops. Nor, as we also earlier said, does *Pardo-Bolland* seem to have articulated (either on the part of the Courts or of the parties there) the combined Fourth Amendment and due process issue of impropriety in the secret cooperation of a trusted hotel host in treacherously betraying its guest to the police eavesdroppers.

Between the time of the decision in *Silverman* and that in *Katz*, the Court decided electronic eavesdrop issues (aside from telephone wiretapping issues) in *Lopez v. United States*, 373 U.S. 427; *Clinton v. Virginia*, 377 U.S. 178; *Osborn v. United States*, 385 U.S. 323; the series of decisions launched by *Black v. United States*, No. 1029, October Term 1965, and *Schipani v. United States*, 385 U.S. 372; and *Berger v. New York*, 385 U.S. 967. A brief consideration of these cases is worthwhile, we think, in trying to arrive at a meaningful sense of what the pre-*Katz* standards were and of how those standards should be applied to this case. (All of the above mentioned pre-*Katz* cases were decided before

the Court below affirmed the convictions in our case (October 13, 1967).)

Did any of the pre-*Katz* decisions mentioned in the above paragraph denote in any way a turn of tide away from *Silverman* towards more toleration of electronic monitoring? *Clinton, supra*, extended *Silverman* to the States. *Lopez, supra*, dealing toleratingly with a "minifon"-type device, was however succeeded by *Osborn, supra*, which upheld use of a similar device only because Fourth Amendment standards of an advance judicial "warrant" procedure were deemed to have been effectively met. The *Black-Schipani* series of decisions, *supra*, have been applying *Silverman* with undiminished and even increasing vigor. *Berger, supra*, applied *Silverman* and *Clinton* as against claims of an adequate Fourth Amendment advance judicial "warrant procedure."

There is nothing, then, in the scene of the decisions between *Silverman* and *Katz* to justify any conclusion other than that the doctrinal disfavorment of strict "trespass" theories first evidenced in *Silverman* has been a discernibly significant part of the pre-*Katz* standards throughout the operative times affecting this case.

Above all, *Osborn, supra*, portended the plenary principle of *Katz* and the doom of the "trespass" test. For, *Osborn* involved no unpermitted Fourth Amendment intrusion in terms of privacy of room premises, as the Waldorf bugging in our case does; in *Osborn* the electronic device was concealed on the person of a police agent who, *Osborn* thought, was a trusted associate of his. And still this Court in *Osborn* applied the Fourth Amendment requirement of an advance judicial "warrant". It is not too

much to say that *Osborn*, one year before *Katz*, laid down the same basic principle as in *Katz*, so far as concerns determination of the central issue in our case, namely, that the Fourth Amendment applies to "non-trespassory" electronic eavesdropping. In fact, *Osborn* goes further than *Katz*, and further than would be needed to reverse our case on pre-*Katz* grounds because, again, *Osborn* did not even involve surreptitious entry or surreptitious participation in the monitored conversation.

If we are correct in our above suggestions as to the impact of *Osborn*, the present case does not necessarily even turn at all on questions of retroactivity of *Katz*, and the judgment may be reversed on the pre-*Katz* standards as most notably instanced in *Osborn*\*.

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\* We have not mentioned, in our above discussion of the decisions between the time of *Silverman* and the time of *Katz*, the case of *Hoffa v. United States*, 385 U.S. 293, because the *Hoffa* case did not involve electronic eavesdropping; the Fourth Amendment issue in *Hoffa* was in terms of a physical invasion, achieved through betrayal of trust by a companion, of the security of Hoffa's private hotel suite, and the Court found that Hoffa had not himself placed his reliance on the security of his hotel suite, but on his confidence, which turned out to be misplaced, in his chosen close personal associates.

**POINT III\***

Petitioners were denied a fair trial by the reception in evidence of electronic eavesdrop proofs which were probatively fatally defective in point of audibility, non-susceptibility to proper translation from the French into the English language, utterly defective language translation as actually attempted by the Government's and the Court's improper translational procedures, defective to the point of utter vitiation by reason of alleged processing or filtering of the tapes for the supposed purpose of eliminating "background noise", and unaccompanied by the requisite voice-identification of the eavesdropped speakers.

We are keenly aware that in criminal cases where conviction has been secured on the basis of electronic sound recordings, the reviewing Courts practically take it for granted that they will have to hear an argument about audibility, or other aspects of probative acceptability, of the recordings or of the human-witness auditor's testimony as to what he heard coming over on the electronic sound machinery. An understandable attitude of conditioned judicial skepticism may confront the party who offers such argument before an appellate court challenging the probative quality of the electronically obtained evidence. We respectfully assure this Court that despite our awareness of this "fact of life" in the contemporary appellate arena which is inclined to be so inhospitable to arguments of this type as to inaudibility, etc., we feel absolutely justified in making the argument of non-probateness in this case.

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\* As noted in Point I, *supra*, the subject of this Point III is relevant to the issue of retroactivity of the *Katz* case because this subject affects the "integrity of the fact-finding process" in this trial owing to the probative defectiveness of the electronically obtained evidence.

because the record **proofs** in support thereof seem to us overwhelming.

The electronic eavesdrop tapes in our case present one important non-typical feature, namely, that they purport to record conversations in a foreign language (French). Immediately, therefore, there was presented for the English-speaking jurors in this trial an intrinsic barrier of communication in listening to these "proofs". And defense counsel at the trial had a duty to their clients to insist that the French-language contents of the tapes be *properly* proved for the understanding and just consideration of a jury of English-speaking persons.

How did defense counsel try to carry out this duty? We took the position, quite simply (and we believe justly), that the only unexceptionably fair way that these French-language eavesdrop recordings could be communicated to a jury in a criminal trial that was being conducted in the English language, was by having an impartial Court-appointed qualified translator or interpreter who could render a *simultaneous translation* (insofar as possible) of the French-language sounds that were audible on the tapes then and there as played in the Courtroom for the jury, i.e., we urged that a neutral and impartial translator or interpreter should be made available to "accompany" the jurors so to say, on a word by word or phrase by phrase or sentence by sentence basis as the tapes were being played for the jury just as a simultaneous translator would do in translating then and there the testimony of a live witness. This position, which we think was the only *fair* and indeed necessary position for the Court to take, was repeatedly but unavailingly urged by us before the jury heard the



tapes as "evidence" (Tr. of April 27, 1966, 50-51; R. 408-438, 454, 458, 487, 542-546).

What was the procedure insisted upon by Judge Palmieri to deal with this problem of laying before the jurors a fair and proper translation of the tapes? The Trial Court was of the view that, since agent Kiere\* spoke French, and since the Court itself and one or two colleagues of counsel for one of the defendants (Nebbia) had some fluency in the French language, it would be practical and fair for the Court to hold *in camera* sessions with counsel and Kiere to try to arrive at an "agreed translation" of the tapes. From the outset, i.e., as soon as defense counsel perceived that this was Judge Palmieri's proposed solution of the problem of how to give the jurors a probatively acceptable translation of the tapes, defense counsel expressed their objections, and they pressed their request above noted for a proper translation procedure whereby the jurors would receive the French-to-English translation of the tapes in a proper trial-proof setting, viz., by having a court-appointed qualified interpreter who could render simultaneous translation for the jurors while the tapes were being played for them as evidence. See, again, R. 398, 408-438, 458, 487, 542-546.

At one point in the *in camera* proceedings above referred to, agent Kiere revealed that in preparing his own written translation transcripts of the tapes in his pre-trial audits, he had written down his results in the form of a transcription directly from French into English, and that he had not prepared any French transcript or any bi-lingual French-English translation (R. 398).

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\* Who had done the Waldorf monitoring and through whom the Government introduced the products of the monitoring at the trial (*supra*).

When the time came to play the tapes before the jury, with agent Kiere performing his supposedly impartial "simultaneous translation", the results were grotesque. This translation performance by agent Kiere is in the record at R. 564, 568-586, 590-593, 596, 599-600, 602-610, 610, 627. Agent Kiere performed these prodigies of "probativeness" as to tape recordings which were pervasively inaudible or unintelligible and in a foreign language, before a courtroom assemblage in which almost no one (and surely no juror, so far as we know) could understand French, with the continual assistance, moreover, of his own "exhibits" consisting of his pre-trial "transcripts" of the translation of the tapes which he himself had made. See especially R. 566-567, 569-572.

We categorically state that, what with the egregious inaudibility and unintelligibility of the tapes plus their being in a foreign language, no truly *impartial* qualified translator could have produced for the jurors' ears the tendentious results self-servingly achieved by agent Kiere.

If the Court had granted our request for an impartial translator the basic testimonial procedure by such a witness would have had to be quite *different* from what agent Kiere did. In the first place, agent Kiere admitted that owing to difficulties of audibility and intelligibility, he had to spend some seventy-five *hours* in translating the taped items involved, which ran for only some forty-five *minutes* (e.g., R. 471-473). Is it conceivable that an impartial court-appointed translator would ever have been permitted to keep chewing away thus endlessly at these defective sound recordings in order to try to chew a "translation" out of them? Defense counsel needless to say would have insisted that the impartial translator be permitted advance access

to the tapes only for such reasonable amount of repeated playings as would be consistent with a fair standard for acceptance or rejection of such recordings on the basis of how readily or how poorly the human ear could really detect intelligible meaning in the sound.

In other words, the impartial translator problem in this case merged with the problem of probativeness in point of audibility and intelligibility; and consequently it was fundamentally unfair to turn over to the tender mercies of a member of the prosecution's own staff (Kiere), *both* the problem of proper translation *and* the problem of audibility and intelligibility.

Be it always remembered, the jurors themselves did not and could not know what was being said in French on the tapes, or even whether this or that French sound was really audible or intelligible at all. The jury had to depend absolutely upon its translator. That person should not have been a member of the prosecution's staff.

Nor was it any answer for the Court to tell defense counsel, as it did, that we could cross-examine Kiere on his translation, or that we could bring in our own translator to rebut Kiere. This would have been a cumbersome procedure that would be almost bound to harm the defense, unfairly, in the jury's eyes, by its sheer tedium, and by the undignified spectacle which it would have created of the defendants' lawyers and *their* translator vying with the Government and *its* "official" translator. And any such procedure would have missed the real mark anyhow because of the intermingling of the translation problem with the audibility-intelligibility problem. What realistic good would it have done the defense to put on the stand their own translator

who, albeit he could do so with perfect truthfulness, would find himself in continual clashes with the Government's translator simply on the question of what could or could not be heard or understood. The scene would have been one in which agent Kiere would keep saying, 'yes I heard this', or 'yes I understood that', and the defense "rebuttal" translator would have to be saying 'no he didn't, because I didn't'.

There was only one way to avoid all this, and that was by Court appointment of an impartial translator as above suggested.

What was probably the climax of unfairness in the translation procedure insisted upon by the Court, occurred at R. 570-571, when the Court, in responding to an objection by defense counsel that Kiere was evidently leaning too much on his previously prepared written translation (Government's Exhibit 20 for identification), said to Kiere (referring to the latter exhibit) "this is a word-for-word translation of this tape, is that right" to which Kiere obligingly replied, "yes, your Honor"; whereupon defense counsel of course immediately objected, in response to which the Court saw fit to reply as follows (in the hearing of the jury, be it noted):

"You made it necessary. I can't leave it a mystery any longer, Mr. Edelbaum. He is looking at this and I want the jury to know what he is looking at because I think it would be unfair to this jury to raise a question that he is looking at something improper. I want the jury to know what he is looking at." (R. 570-571)

Understandably appalled, defense counsel moved for a mistrial, which was denied (R. 571).

We had not ever wanted that the jury should obtain its "translation" of the possibly vital content of the French-

language tapes through the methods that the Court had insisted upon; we had not wanted agent Kiere to be apotheosized as the "impartial translator" before the jury. How unjust, then, for the Court to announce before the jury that agent Kiere's self-serving written translation, prepared by him pre-trial and *ex parte*, and only after prodigious travail (seventy-five hours by his own account) in trying to overcome insuperable difficulties of audibility and intelligibility, was "a word-for-word translation of this tape."

There is another important aspect concerning the probative quality of these tapes. On the Nebbia-Desist tape of December 16, 1965, the Government had sent the original tape to an outside company to try to improve audibility by filtering out extraneous noises (R. 346-347, 385-395). A representative of the outside company was brought before the Court in an *in camera* session which preceded the playing of the tapes to the jury (*ibid*). This man, Tony Roberts, gave only the most general sort of information as to what his company had done on the filtering job, and defense counsel took the position that Roberts should be brought back to be examined in detail before the jury, i.e., after defense counsel had had an opportunity to compare and study in a thorough way both the original tape and the treated tape (*ibid*). But the Government never brought Roberts back, and, over defense objections, the filtered tape was played to the jury without any anterior testimony as to its probative competence in view of its having been produced in the manner above indicated. The Court denied a specific request by the defense that Kiere not be permitted to testify on the basis of the filtered tape until the jury should first have heard the unfiltered tape (R. 486-491).



As regards the details of the actual courtroom performance of agent Kiere in giving the jury his running translation (with the aid of his written transcript), see R. 564, 568-586, 590-593, 596, 599-600, 602-610, 610-627. The cross-examination of Kiere on this subject revealed, on item after item, grave flaws of audibility and translation (e.g., R. 719-728, 741-747, 729-741, 885-894, 924-930).

At R. 714, when Kiere was asked to what extent his testimony as to what he himself had heard coming through on the electronic machinery (R. 553-563) had been based on his memory of what he actually heard or instead had been based on having repeatedly heard the tapes played over and over again, Kiere frankly replied. "I honestly don't remember which I remember independently and which I remember from the tapes."

Now, if there is any one point agreed upon in the authorities on the subject of authentication of sound recordings to render them probatively admissible in evidence, it is that there must be a showing that the recording device was capable of taking testimony, and the required method of making this indispensable showing is by testimony from a human monitor of the recording stating that he could himself hear what was coming over the recording device; see 58 A.L.R. 2d 1024, 1027, 1032, 1033, 1034 ("Admissibility of Sound Recordings in Evidence"). We submit that the above-acknowledgement by agent Kiere that he simply did not know what he himself had actually overheard on the eavesdrop device and what he now thought he may have overheard but which could have come instead from replaying the tapes, required exclusion of these tapes on the ground alone of the rule of admissibility just cited.

And if there is any other basic and indispensable requirement for admissibility of sound recordings it is that there be a proper identification of the voices of the alleged speakers (*id.*, at pp. 1032-1036). The proofs in this trial as to voice identification were inadequate practically to the point of being ridiculous. It is undisputed that Kiere had no familiarity with (in fact he had never heard) the voices of Nebbia, Desist or LeFranc when he first purported to identify their voices on the electronic listening device (*e.g.*, R. 508, 588-589, 641-646, 689-691, 776-785, 846-853, 866, 930-953, 970-980). The way that the Government undertook to establish such voice identification was by testimony from another agent that he had used binoculars, a 7 x 50 Navy type, to peer into Nebbia's room from the rooftop and from a room of another hotel, the distance involved being approximately 380 feet, the conditions of visibility being that it was dusk (in the 4:30 P.M., December 17 observation involving Nebbia and LeFranc) or nighttime (in the 8 to 8:30 P.M. observation involving Nebbia and Desist on December 16), and the testimony being hopelessly unclear as to just how much of the window aperture of Nebbia's room was exposed to view as regards curtains, window shades or blinds (R. 362-367, 1174-1186, 1252-1276, 1281-1293, 1316, 1334, 1340-1349).

Casting extreme doubt on the reliability or veracity of this testimony of binocular observation are the following circumstances regarding the alleged observation of Desist in Nebbia's room at around 8 P.M. on December 16. Desist called a witness who swore that Desist had been in his company that entire evening from about 7 P.M. on; this witness, Alriq, is the owner of a fashionable and reputable restaurant in New York City; his testimony was positive, unequivocal and altogether circumstantially detailed; his

testimony remained entirely unshaken on cross examination (R. 1624-1636). We are not of course suggesting that this testimony of Alriq "proves" that the Government's binocular witness was lying or mistaken, and we realize this was a matter for the Jury. We are mentioning this Alriq item (1) because it did *pro tanto* (as to Desist) negate the *only* "voice identification" proof of the Government\* in connection with these dismally "probative" (and unconstitutional electronic recordings; and (2) because it ties in rather interestingly with another item which we believe has an important bearing on this whole question of the reliability of the voice identification proofs based on the alleged binocular surveillance. It was taken as established at the trial that Desist went by plane to Rochester after the alleged conversation with Nebbia, and that from Rochester Desist went by plane to Columbus, Georgia where, according to Conder's testimony, the latter met Desist at the airport (59a-60a). Now, all of this New York-Rochester-Columbus plane travel by Desist is supposed to have been revealed to the agents through the eavesdropped Nebbia-Desist conversation on the evening of December 16 (60a). With this last fact in mind, it becomes important to have in mind also that, according to the Government's theory of the case, the whole crux or central object of the investigation was to locate the mysterious person to whom Desist, Nebbia and LeFranc were supposed to be going, somewhere in Georgia, to take possession of the hoard of narcotics. With these points in mind, does it not become very puzzling, at the least, that the Government evidently did not follow Desist from New York to Rochester, or from Rochester to Columbus, Georgia where (again, according to Conder)

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\* The binocular-observation proof, *supra*.

Conder met Desist at the airport? The Government says that it discovered Conder only at a later stage, and as it were by accident or luck at that, in a scene in which the agents unexpectedly stumbled upon Desist while the latter was sitting in a restaurant with Conder (62a). We repeat, if the Government knew, as it claims from allegedly having overheard Desist and Nebbia on December 16 (*and from having supposedly identified Desist with binoculars at that same time*), that Desist was going to Rochester and Columbus, why did not the Government follow Desist in the quest for the prime prey whom they were supposedly stalking, namely, Conder? With the massive and intensive investigative resources which the Government is supposed to have thrown into this case from the time of Nebbia's arrival in the United States, is it conceivable that the Government would not have followed Desist to Rochester and Columbus *if the Government had really known that he was going to those places*, which, again, the Government says it did know from the Nebbia-Desist eavesdrops and from the ostensibly simultaneous binocular observation and "voice identification"?\*

As above said, the issue of Desist's "alibi"-type testimony *per* the restaurant witness Alriq, was in itself naturally an issue for the Jury. But this Alriq testimony, when considered together with the above suggested anomaly (the politest word we can think of in the circumstances) of the Government's failure to trail Desist when it claims it knew

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\* In fact, Kiere testified (p. 14, *supra*—see R. 558) that in bugging the Nebbia-Desist conversation at the Waldorf he heard Desist say he was going to Rochester "to see the boss". If the Government knew this (by "identifying" Desist at that binocular-viewed conversation with Nebbia), why is this record silent as to any surveillance of Desist en route to or in Rochester?

through eavesdropping that he was going to Rochester\* and to Georgia, presents for this Court's consideration, we submit, a "non-jury" issue, i.e., an issue of "law" in point of the admissibility of a crucial part of the Government's proof, namely, the issue of the adequacy of the legally requisite and indispensable proof of "voice identification" as a pre-condition of the reception in evidence of the tape recordings. In other words, our above analysis is believed to give the strongest kind of indication that the Government's binocular proof of Desist's being seen in Nebbia's room at the time of the December 16 eavesdrop is too untrustworthy to be accepted on the vital issue of admissibility of the recording. And if the binocular testimony is thus vulnerable as to the Desist-Nebbia episode, what is its value as to the LeFranc-Nebbia episode?

Further indications of the unreliability, if not indeed the utter spuriousness, of the voice identification proofs appear at R. 508, 588-589, 640-646, 689-691, 694, 776-785, 846-853, 866, 930-953, 957-959, 970-980.

We therefore submit, for all of the above reasons, that the Government's proofs based on the tape recordings were, taken in their entirety, far below the standard of probative acceptability for proofs of this type (see, again, the Annotation previously cited, 58 A.L.R. 2d 1024). The defectiveness in this proof resided both in the serious credibility problems discussed immediately above, and in the gross and pervasive technical imperfection of the recordings and of the whole French translation procedure which we have above described.

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\* See the last preceding footnote.



In conclusion on this branch of our argument, the frequency with which imperfect recordings do receive judicial acceptance in this country prompts us to comment as follows: Would the courts of this country tolerate, in the proffering of any other form of evidence, for example, documentary evidence, such physical imperfections, such pervasive lacunae, such fragmentation and shredding and all-around spoilage of the "text", such clumsy mutilation, such net undecipherability as in the eavesdrop recordings here involved? Would our courts tolerate, in any documentary proof, or in any human witness' memory on the stand, this patchy, disintegrated sort of probativeness? What is there about electronic eavesdropping that should so often endow it, above all other modes of proof, with such a unique undeclared but effective immunity from the traditional rules of Anglo-American judicial proof? Electronic eavesdropping, because of its offensiveness to the civilized decencies of a free society, and not less because of its susceptibility to "gaps" and "inaudible parts" as is so dramatically instanced in this case—why is that one never seems to get audible police recordings which are *exculpatory* of a defendant—ought to be treated, under the tests of probativeness, as the lowest, not the highest quality of proof is treated.

## POINT IV

**The judgments of conviction against petitioners Dioguardi and Sutera should be reversed because there was insufficient evidence for submission to the jury, or for conviction under the rule of reasonable doubt, on the essential element of knowledge of importation of narcotics—there concededly being no proof whatever of conspiracy to import on the part of Dioguardi and Sutera, and there being likewise no proof of actual or constructive possession subsequent to importation.**

The Trial Court charged the Jury that (48a):

“In this case I charge you as a matter of law that you cannot find that the defendants Dioguardi and Sutera were in possession, actual or constructive, of the drugs at any time. As to them you must find actual knowledge that the drugs were illegally imported from abroad. If you fail to find such actual knowledge on the part of Dioguardi and Sutera beyond a reasonable doubt, I charge you it is your duty to acquit them.

In furtherance of its contention that they had actual knowledge, however, the government asserts that their meeting with LeFranc, a Frenchman, who allegedly informed them that, “It was here already,” meaning, the government says, in the United States, along with other evidence is sufficient basis for the conclusion that Dioguardi and Sutera knew the drugs to have been illegally imported.”

Thus, this entire case against Dioguardi and Sutera stands or falls, literally, on the question of whether the Trial Court was correct (as a matter of law) in letting the Jury consider the indispensable issue of actual knowledge of importation on the basis of absolutely nothing more than the

single item of testimony referred to by the Court as above quoted, i.e., "It was here already".

Before we examine further the import of the words "It was [or is] here already" we may briefly dispose of the Trial Court's further reference in the above quoted instruction to "other evidence" or "along with other evidence" which, according to the Trial Court, the Government claimed also showed actual knowledge of importation. It may be categorically stated that this reference by the Trial Court to any such "other evidence" is incomprehensible because it is without any support whatever in the record. The Government's requests to charge no's 16 (re knowledge of illegal importation) and 21 (re the proofs as a whole concerning Dioguardi and Sutera) embody, we take it, the entirety of the Government's factual contentions against Dioguardi and Sutera in this case. They give no slightest hint of anything on the issue of actual knowledge of importation beyond the above noted words "It is here already". We await with interest any demonstration by the Government in its brief in this Court that the record contains, on the issue of Dioguardi's and Sutera's actual knowledge of importation, any such "other evidence" as was apparently suggested by the Trial Court in its above quoted charge to the Jury.

Let us now examine the words "It is here already". (Naturally, in undertaking an examination of these words we are assuming *arguendo* that the words may in fact be probatively taken as referring to narcotics rather than to some other items or transactions—as to which see further *infra*.) Even if the words "It is here already" refer to narcotics, then, those words do not establish that "here" was being used in contradistinction to "there" as referring to

a foreign country. The word "here" may just as rationally mean "here" someplace in the United States as distinguished from some other place in the United States. Can it be denied that it is nothing more than the merest (and the most unjust) speculation to attach to the word "here", in the instant context, a meaning *beyond a reasonable doubt* that the word meant, to its alleged users, that an importation from a foreign country was involved. We respectfully repeat, it would be the sheerest speculation, and an unthinkable perversion of the rule of reasonable doubt, to urge that the word "here" or the words "here already" may justifiably, or much less must, be understood as referring to importation "beyond a reasonable doubt." Fairness requires looking the facts in the face in this critical matter involving such heavy jail sentences. Is there any other fact or shred of fact in this alleged scene to justify the conclusion of a reference to importation "beyond a reasonable doubt", other than the single fact that LeFranc happened to be a person who spoke with a French accent? If Dioguardi's fifteen-year jail sentence, and Suterá's ten-year jail sentence, are to be sustained on anything besides the inconclusive four words "it is here already," the fact must be faced that it would be so simply and only because they were allegedly talking to a man with a French accent.

We respectfully submit that it is inconceivable that Federal criminal justice, even allowing for the attritions of fair justice effected in recent decades by the conspiracy-prosecution device and by the "presumption" philosophy, could consign a man to ten or fifteen years imprisonment merely because, in an alleged narcotics case, he was talking negotiatorily (allegedly) to a putative "foreigner" who spoke the cryptic words "It is here already."

The issue of Dioguardi's and Sutera's actual knowledge of illegal importation should never have been submitted to the Jury. The Jury's finding of guilt on this issue cannot be even remotely reconciled with the rule of reasonable doubt.

## POINT V

**The judgments of conviction as to appellants Dioguardi and Sutera should be reversed for insufficiency of evidence on the conspiracy charge in any aspect.**

Aside from the argument tendered in our Point IV, *supra*, as to actual knowledge of illegal importation, we also respectfully urge that the evidence was insufficient altogether to link Dioguardi and Sutera to any charge of narcotics conspiracy.

We realize that the Government's basic reasoning in support of the conspiracy charge against Dioguardi and Sutera is that, if the testimony of the agents is believed, Dioguardi and Sutera conducted with LeFranc a conversation which, albeit ambiguous and even amorphous, is susceptible of being construed as denoting that what the parties were allegedly discussing was some kind of "transfer" to Dioguardi and Sutera of the narcotics in Georgia which the Government contends LeFranc (with Nebbia and Desist) was planning to obtain from Desist's contact man in Georgia (allegedly Conder).

However this is not a case for free-wheeling interpretation of people's conversations. It is a criminal case, governed by the rules of the criminal law, including the rule of reasonable doubt. There is a limit to the number and to the attenuation of the assumptions which may be indulged



in a criminal prosecutive situation of this kind. Suspicion is not enough, and *any* speculation is surely wrong in such a situation.

Narcotics were not mentioned in the alleged conversation at the Adano Restaurant. All that was allegedly mentioned was "it"; what is the antecedent of "it"? True, it was urged by the Government below (successfully) that "it" meant "merchandise" and that "merchandise" meant heroin. The lexicographers whose authority was deemed judicially probative (and for the purposes of criminal proof, to boot) on the meaning of "merchandise" were a couple of narcotics agents who were blithely asked, were blithely permitted to answer, and blithely answered that to them "merchandise" meant narcotics!

Here again, we respectfully ask, is this the stuff of fair and just due process criminal conviction in this country at the present era?

The question is not whether "merchandise" might well, in various settings, vernacularly mean narcotics. The question is, rather, whether this kind of word usage or word understanding, testified to by ardent institutional gentlemen of the police-minded orientation here involved, has a place in the solemn and dread procedure of the proof of facts at a trial for crime in a Federal Court.

The total corpus of the allegedly inculpatory facts against Dioguardi and Sutera—deriving solely, it must always be remembered, from the single alleged conversation with LeFranc at the Adano Restaurant—is too insubstantial, too thin, too *doubtful*, to admit of criminal conviction under the rule of reasonable doubt.

Suspicion there is in this record against Dioguardi and Sutera; we would be foolish to deny it. But is there *adequate* proof of criminal guilt under the charges of this indictment? There is not even proof that a bargain had definitely been struck between Dioguardi-Sutera and LeFranc. *If the Trial Court had thought a bargain was struck, or that the proofs allowed a conclusion to that effect, would the Court have gone to such pains to declare to the Jury as a matter of law that they could not find that Dioguardi and Sutera had even constructive possession of narcotics?*

The whole case against Dioguardi and Sutera is too vague, too remote, too indefinite and uncertain for the purposes of the standard here operative, the standard of reasonable doubt.

Cf. *United States v. Cianchetti*, 315 F. 2d 584 (C.A. 2 1963), where failure to prove consummation of alleged conspiratorial overtures or negotiations in a situation far more concretely evolved towards criminality than this one, was held to require reversal of the conviction and dismissal of the indictment.

## POINT VI

The judgments of conviction against petitioners Dioguardi and Sutera should be reversed because they were denied a fair trial by the Court's prejudicial conduct in responding to a request by the jury, after the jury had retired to consider its verdict, for testimony relating to the conversations overheard by the agents at the Adano restaurant.

At 150a-156a, after the Jury had retired to consider its verdict, the following occurred:

"(At 6:20 p.m., a note was received from the jury.)

(Marked Court's Exhibit 11.)

\* \* \* \* \*

The Court: I am sending this note in answer to the jury's note, which reads as follows:

'We would like Agent Gruden's and Agent Smith's testimony as to what was overheard at the bar at Adano's restaurant.'

I am sending this note:

'Ladies and gentlemen of the jury, your request for testimony of Agents Gruden and Smith will be read at the time when you return from dinner. It will take some time to read, and I do not wish to interfere with the dinner arrangements made for you.'

\* \* \* \* \*

(The following took place in the robing room at 8:00 p.m.)

Mr. M. Edelbaum: What is the question again? That is what I want to find out. I want to get the note. What was the note, exactly?

Your Honor, I ask that page 1301 be read to the jury, page 1302 because particularly at page 1302:

'Q. Just prior to when he left, at the bar, he told you, "I heard them saying this"? A. I asked him what they were talking about before I got in and he told me.

'Q. And was this in a whisper? A. No, this was—  
I say that all relates to conversation, and I ask that it be read.

The Court: The jurors' request is, 'We would like Agents Gruden's and Smith's testimony as to what was overheard in the bar at Adano's Restaurant.'

\* \* \* \* \*

This conversation which you have just read has to do with what the agents say to each other, not what they overheard.

I deny your request.

Mr. M. Edelbaum: I also ask that page 1303 be read to the jury.

The Court: I don't see anything there that indicates what he overheard.

Mr. M. Edelbaum: It all deals with the same episode, and I submit to your Honor it is proper to be read.

And I ask that pages 1304, 1305—

The Court: Will you please refer me to the question, the line on 1303 that indicates what was overheard by agents Gruden and Smith?

Mr. M. Edelbaum: It is the situation that was there. I don't think that the request should be interpreted literally. I think they are entitled to know the situation, what they could hear and whether they could hear it and what was heard. I am asking for 1304, 1305, 1306, 1307, 1308 (2513) to be read to the jury.

The Court: I deny your request on the ground that there is nothing in those pages which constitutes overheard conversations.

Mr. Jones: Most respectfully, your Honor, I join Mr. Edelbaum and additionally request the following pages read of the different agents' testimony which reflect the different circumstances of the incident with the phone call.

The Court: That is not what the jury has requested. They want the agents' testimony as to what was overheard. I realize that you gentlemen have a very litigious interest in producing all of the surrounding circumstances in an effort to upset that testimony in the jury's opinion, but that is not what they have asked for.

Mr. Jones: Most respectfully, your Honor, we would request the following pages of Gruden's: 1059. Smith, 1138 and 1139, 1188, 1296, 1297 and 1298, all in connection with the same incident.

The Court: I have gone through all of the direct testimony, and if any of those pages include overheard conversation they will be read, and if they do not include overheard conversation (2514) they will not be read.

If you have any references to any pages—

Mr. Jones: 1059, 1060.

The Court: That is all included.

Mr. M. Edelbaum: Is this on the record?

Your Honor, *I think that the cross-examination should be read to this jury to show the context as to whether or not the agents actually did overhear what they claim they overheard on direct examination, and the whole purport of the cross examination was towards that, not to ask them to repeat what was said on direct examination, and that the direct examination, if the direct examination is read as to what was heard, we are entitled to have the cross examination heard. I rest on that.*



Mr. Jones: The cross examination goes as to what was said.

The Court: Not at all. You gentlemen were careful to steer away from what was overheard. You did your best—and of course I have no criticism—in trying to demolish the credibility of the agents' testimony. But in this case the jury has asked a specific question about testimony as to what was overheard. I underscore the word 'overheard.'

\* \* \* \* \*

Mr. M. Edelbaum: What about 1130?

The Court: I don't see anything there as to what he heard.

If you will point it out—what is there that he overheard?

Mr. M. Edelbaum: Your Honor, it shows that he couldn't overhear. Now, before your Honor gets that way, if you will just go back to 1108, and the best thing that I can point out that the cross examination be read is by reading that page. 1108. Your Honor denied it, and I am satisfied to leave it on the record. 1109.

(2516) The Court: Denied. I see nothing on that—

\* \* \* \* \*

I see nothing on pages 1108 or 1109 which constitute testimony of overheard conversations, and for that reason I deny your request.

Mr. Jones: For the record, I join in the request.

(The proceedings resumed in open court, jury in box.)

The Court: Ladies and gentlemen, I have received your note:

'We would like Agent Gruden's and Agent Smith's testimony as to what was overheard at the bar at Adano's Restaurant.'

The stenographer is prepared to read that. We will hear both the direct and cross examinations of Agents Gruden and Smith in those passages where they testified with respect to overheard conversations.

(The following portions of the record (2517) were read to the jury:)

Page 1056 line 17 to 1064 line 24. 1096 line 5 to 1097 line 9.

1101 line 1 to 1102 line 23. 1128 line 1 to 1130 line 18. 1139 line 4 to 1143 line 7. 1144 line 3 to 1145 line 8.

The Court: All right, ladies and gentlemen, your request has been granted, and you may withdraw.

(At 8.35 p.m., the jury left the courtroom.)

Mr. M. Edelbaum: Your Honor, does the record denote exactly what was read? There was no other stenographer here while the reporter was reading. May we have it endorsed on the record, each question and answer that was read, have that included in the record, to this jury? I want placed on the record exactly what he read.

The Court: I direct the stenographer, in accordance with the request of defense counsel, to make a note on the record of every page that was read and every line, indicating the starting and the ending line in each passage.

Mr. Jones: Your Honor, at this time we (2518) further renew the motion of the conversation concerning the telephone incidents be allowed in at this time, since your Honor allowed him to read the conversations on the phone and what he overheard at this time. Therefore, this is not what was at the bar. It goes further in scope. Therefore, we should be allowed to bring in what was heard in relation to these phone calls, because the note, as I recall it,

only says as to what was at the bar. However, we have heard all kinds of testimony as to what he allegedly heard at the phone. Therefore, I submit we should be able to bring in at this time the other circumstances surrounding these phone calls.

The Court: All right. You may have an exception.

Mr. M. Edelbaum: May I just point out one other thing: Your Honor even permitted the stenographer to read to the jury, 'What does the word "merchandise" mean to you,' the definition of that, that it meant narcotics.

What that has to do with the question I fail to understand in view of your Honor's refusal to permit us to have the cross examination (2519) read.

The Court: All right. I am sorry you are displeased, gentlemen.

Mr. M. Edelbaum: I am displeased on behalf of my client.

The Court: I had the stenographer read the testimony that was heard in the bar in Adano's Restaurant. This telephone was a wall phone, practically adjacent to the bar. And you never raised this question before. I thought that I was complying in good faith with the jury's request, and I am sorry that your very able cross examination was not included, but it was not asked for." (Emphasis supplied)

It is submitted that Dioguardi and Sutura were prejudiced in the extreme by the Court's insistence upon treating the above request to the Jury in so one-sided and restrictive a way. The testimony for which the Jury asked was the dispositive testimony, one way or the other, affecting Dioguardi and Sutura. As seen, the testimony of the two agents

mentioned by the Jury had been subjected to the most intensely grilling cross examination (see the statement of the case, pp. 29-31, *supra*). Defense counsel therefore asked the Court, in responding to the above quoted note from the Jury, to let the Jury have the entire relevant cross examination as well as the direct testimony of the agents. The Court absolutely refused, however, to construe the Jury's note as calling for anything except that which "the agents said they overheard"; the Court insisted on reading the language of the Jury's note as though it were construing a negotiable instrument or a statute of Congress. Yet at the same time, in a puzzling further departure from fairness, the Court gave the Jury something else which they had *not* asked for, at least they had not asked for it under a "strict construction" of their note. We refer to that other conversation, not "at the bar at Adano Restaurant" (the language of the Jury's note), but at a telephone in that restaurant to which Dioguardi had gone alone two or three times during that evening.

This erroneous and unfair way in which the Trial Court administered the vital portion of the proceeding involving the above quoted note of the Jury is believed to have had an altogether probably decisive effect adverse to Dioguardi and Sutera in this case, which as to them was so weakly proved and in which the balance might so readily have swung in their favor.

## POINT VII

Petitioner Nebbia (and by prejudicial overflow the other petitioners) was denied a fair trial, due process of law, the constitutional right of confrontation with the witnesses against him, the effective right to be present at his trial, and the effective assistance of counsel, by the refusal of the trial court to provide Nebbia with an impartial, court-appointed French interpreter qualified to render simultaneous translation for Nebbia's understanding of the proceedings.

Commencing in the pretrial proceedings, counsel for Nebbia apprised Judge Palmieri that Nebbia has no understanding of the English language—a fact which is undisputed—and requested the Court to provide a French translator qualified to render simultaneous translation; this request, and objections based on denial of the request, were repeatedly urged by Nebbia's counsel throughout the trial proceedings and were denied (see Tr. of April 27, 1966, pp. 30-36, 44-46, 47-49; Tr. May 18, 1966, pp. 60-66; Tr. June 7-8, 1966, pp. 72-76, 78-86, 234-237; R. 349, 1949, 2030 et seq., 2174-2175; sentencing minutes, August 30, 1966, pp. 24-27).

It is of interest that, when the request for an interpreter was first broached, the intrinsic and obvious fairness of the request apparently struck Judge Palmieri's mind as self-evident, and the Judge spontaneously expressed himself in a gracious and receptive manner concerning the request, stating however that he was not certain of his authority to grant the request at public financial expense and that he would look into the matter (Tr. of April 27, 1966, pp. 30-36).

However, on the next occasion (pretrial) when the matter again came up, at the proceedings of May 18, 1966, the Gov-



ernment vigorously objected to assuming the financial expense because Nebbia was not indigent, and the Court announced that, having been able to find no authority for requiring the Government to undertake the expense, the request would be refused (Tr. of May 18, 1966, pp. 60-66). The request was further urged at the final pretrial proceedings, June 7-8, 1966, but again without avail (Tr. of June 7-8, 1966, pp. 72-76, 78-86, 234-237). For the subsequent proceedings on this subject, see the citations to the record given at the close of our opening paragraph *supra*, in this Point VII.

One especially regrettable circumstance in connection with this refusal of Nebbia's request for an interpreter is that, apparently both the parties and the Court were unaware, until it was too late (as explained *infra*), that the new Federal Criminal Rule 28(b), which was to take effect July 1, 1966, expressly provides as follows:

“(b) *Interpreters.* The Court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the Court may direct.”

The first mention of this new Rule in the record of this case appears in the trial minutes for July 7, 1966, R. 2030-2031, which was during the summations by counsel at the end of the case, the taking of testimony having been concluded on the preceding day (R. 1947). On that day of July 7, at the conclusion of the summation to the Jury by Nebbia's counsel, the Court addressed the latter, saying (R. 2030-2031):

“The Court: Mr. Stream, you know that Rule 28 (b) (1) of the New Criminal Rules permits the Court to designate an interpreter. This is something new

under the sun, the power that we did not have when the trial began, and I considered the advisability of having an interpreter designated by me for the close of the trial, but I notice that this morning you had a French speaking partner talking to your client and I assume that LeFranc, who is his French speaking friend and who is in jail with him would probably be able to translate the transcript, so I don't know that it would cure any error that has already occurred. I don't think it would, but I'm ready to extend that courtesy if you want it.

Mr. Stream: I do believe, your Honor, and I'm grateful for the opportunity, that if error there has been it is too late to be corrected and so far as the summation is concerned I will see to it that it is properly translated and given to my client. Thank you for the offer.

The Court: All right."

The following day, July 8, the Court placed on the record a statement that he and Nebbia's counsel had agreed on the preceding day that to give Nebbia an interpreter at that late stage "would not cure any error, if error had indeed been committed, through the absence of a simultaneous interpreter provided by the Court \* \* \* " (R. 2174-2175).

When the Court said on July 7, as above quoted, that "This is something new under the sun" [referring to the new Rule 28(b)], the Court was over-simplifying things quite a bit. As long ago as March 31, 1964, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States had issued its "Second Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for the United States District Courts"; this had been published in 34 F.R.D. 411 *et seq.*, the bound

volume of said Volume 34 having appeared in 1964; the proposed new Rule 28(b) appeared at 34 F.R.D. 411.\* In fact, as long ago as December 15, 1962 the Committee had issued its first "Preliminary Draft" which was published in 31 F.R.D. 665 *et seq.* (1962-1963), and the present new Rule 28(b) was already contained in that first draft\*\* at 31 F.R.D. 29. Then, again, in March 1966, there appeared, in pamphlet edition, Volume 39, No. 1 of Federal Rules Decisions, which printed the proposed amendments as transmitted to Congress February 28, 1966, and printed also the final amended rules themselves (39 F.R.D. 69, 168, 189 (the proposed Rule 28(b)), 252, 261-262 (the final new Rule 28(b) as adopted).\*\*\*

This new Rule 28(b), then, was far from being "something new, under the sun" during all the times pertinent in this trial. We realize, as above said, that defense counsel, and not only the Court as well as the Government, failed to bring up the subject of this new Rule 28(b) earlier in the proceedings. But we respectfully do not think that any proper impingement of any doctrine of waiver, or of some reversed form of the doctrine of "ignorance of the law", should preclude Nebbia from urging the points which we shall suggest *infra* in regard to the question of how the new Rule 28(b) could and should justly have been applied in Nebbia's favor if the situation had been known earlier by Court and counsel.

There are two ways, we respectfully suggest, in which the new Rule 28(b) could and should have operated for Nebbia's benefit.

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\* With a slight difference of language not here significant.

\*\* See preceding footnote.

\*\*\* The earlier drafts contained slight verbal differences as to defrayal of expense, not here pertinent.

*First*, in view of the Trial Court's expressions (noted *supra*) as to having been unable to find any guiding authority bearing upon the subject of our request for appointment of an interpreter, we suggest that if the Trial Court had wished to do so it could have invoked Rule 28(b) even prior to its effective date (July 1, 1966) as denoting a policy or principle favoring the granting of such request in the exercise of an inherent jurisdiction or discretion of the Federal District Courts; in other words the Trial Court could have ruled, with entire propriety, we submit, that the new Rule 28(b) represented a "codification" of established principle, custom or authority; or at least that it expressed a "codification" of a pre-existing better or fairer practice as a matter of discretion; or at the very least that it expressed a codification of *one* permitted discretionary alternative on the part of the Federal District Judges. The authorities cited *infra* support, we believe, these suggestions.

*Second*, and we believe more important, the provision which appears as paragraph no. 2 at the conclusion of this Court's order promulgating the new criminal rules (39 F.R.D. 252, at 271), i.e., the effective date provision, reads as follows:

"2. That the foregoing amendments and additions to the Rules of Criminal Procedure shall take effect on July 1, 1966, and shall govern all criminal proceedings thereafter commenced *and so far as just and practicable all proceedings then pending.*" (Emphasis added.)

As above noted, Judge Palmieri was first requested at pretrial to appoint an interpreter for Nebbia on April 27, 1966; and the pretrial request was repeated May 18, June

7-8, and during the trial, which ran *from June 15 to July 11, 1966*. The indictment in this case was filed January 5, 1966 (1a). Unusually laborious and necessarily lengthy pretrial proceedings were necessary in this case, as a glance at the docket entries (1a *et seq.*) and at the Index to the Record On Appeal in the certified record herein reveals. During the pretrial proceedings hereinbefore cited the Court was emphatic and insistent in urging upon counsel that the trial must commence without any delay beyond June 15, 1966 (e.g., Tr. of May 18, 1966, pp. 45-54; Tr. of June 7-8, 1966, pp. 276-279). In other words, there were perfectly legitimate reasons why the commencement of the trial did not precede June 15, 1966, and the setting of the latter commencement date was an act of insistent expedition on the part of the Trial Court itself, but, we emphasize, this expediting of the trial does not appear to have been required for any particular reason of which we are aware, and surely not for any overwhelming or irresistible reason. What we are driving at in mentioning these dates and their surrounding circumstances is, that if the Trial Court had taken into consideration the above italicized final clause of the effective date provision of the new Criminal Rules, the Court would have been well advised to do one of the following two things: (1) The Court may well have determined that it was wisest to defer the trial for a period of just two more weeks so that, with the trial commencing on or after July 1, 1966, the Court's own expressed doubts, uncertainties or qualms about its authority to supply an interpreter (which, as seen, the Court had at first spontaneously thought it ought to do), could have been obviated by this simple expedient of putting off the trial for just another two weeks (or sixteen days to be exact). Or, (2) the Court could have invoked the above quoted last clause of the



effective date provision of the new Rules by declaring on the record that this trial which was set to commence June 15, 1966, was predictably expected (as was realistically true, beyond dispute we believe) to extend at least until July 1, 1966; and that therefore this trial, as of July 1, 1966, was predictably going to be "a proceeding then pending" (the language of the above quoted last clause of the effective date provision of the new Rules); and that therefore in the Court's discretion it was deemed just and wise to treat this trial as predictably being a trial which would be "then pending" on July 1, 1966; and that the Court, prior to July 1, would therefore direct the appointment of an interpreter with express provision that the compensation arrangements for such interpreter would be made formal and final on or after July 1, 1966, or prior to that date if the Government consented thereto. Indeed there are numerous alternatives, or permutations or combinations, which the Trial Court could properly have employed for this purpose of granting to Nebbia the benefit of the last clause of the effective date provision of the new Rules. For example, the Trial Court could have asked Nebbia's counsel whether, in the event that ultimately a retrospective "*nunc pro tunc*" application of the new Rule should be judicially disapproved, Nebbia would then consent to assuming a properly allocated or *pro tanto* expense for any interpreter services preceding July 1, 1966. Or, the Court could have *required* both Nebbia and the Government to abide the eventual judicial outcome as to who should pay for the services of a Court-appointed interpreter for any particular number of days preceding July 1, 1966. There was, in short, some way, there *had to be* some way, of justly and properly providing Nebbia with a Court-appointed in-

terpreter for the days of this trial which so nearly preceded July 1, 1966. And, we respectfully urge, it is not Nebbia's fault that some such way was not found. We intend no facetiousness when we say that the maxim "Ignorance of the law is no excuse" is applicable to the Trial Court's actions in this case in having refused Nebbia the services of a Court-appointed interpreter.

As earlier said, it is undisputed that Nebbia does not understand the English language. He sat through this trial, in effect, as a deaf mute—except for such incomplete translation assistance as he may have sporadically received from French-speaking colleagues of defense counsel who were obviously in no position to afford Nebbia anything approaching simultaneous translation, and who (we can categorically assure this Court) did not afford Nebbia any such service of simultaneous translation. In effect, Nebbia was not only denied *any* effective confrontation with the witnesses against him, as well as effective assistance of counsel, he was even denied for all practical purposes the cardinal constitutional right of being "present" at his own trial owing to the language barrier.

(Incidentally, Nebbia's own inability to participate effectively in the trial must be presumed to have prejudiced also his co-defendants in this single-count *conspiracy* prosecution, through disabling Nebbia to contribute any observations or suggestions for the defense of himself (and thereby of the alleged co-conspirators-defendants).)

What of the "case law" on the subject of a criminal defendant's right to have a court-appointed interpreter? Here again, unfortunately, it appears that neither the Trial Court nor counsel for either side was apparently aware that

there existed an appreciable amount of pertinent "case law" on the subject, in the conveniently available form of an A.L.R. Annotation—140 A.L.R. 766 ("*Right Of Accused To Have Evidence Interpreted To Him*") ; with which see also 172 A.L.R. 923 ("*Use of Interpreter In Court Proceedings*"). The annotation in 140 A.L.R. 766, *supra*, was prompted by *State (Utah) v. Vasquez*, 121 P.2d 903 (S. Ct. Utah, 1942), which appears to be the leading American authority on the subject. The defendant Vasquez was on trial for murder, he spoke Spanish and what some witnesses described as broken English, his counsel spoke English and did not understand Spanish, and a request for an interpreter was refused. In reversing the conviction, the Supreme Court of Utah said, "If the defendant cannot understand what the witness is relating, from some points of view it is analogous to his being out of hearing". The Court also said (121 P.2d at p. 906) :

"As has heretofore been stated, the right of confrontation, in a constitutional or bill of rights sense, is more than the dictionary definition, viz., to meet face to face. A trial is more than a meeting of a defendant by witnesses face to face and silently. The confrontation is the meeting of the proof or evidence as understood by the interested parties according to their understanding.

It is important that the trial court in the exercise of its discretion as to the necessity of an interpreter, either for the defendant or for a witness, be fully advised. It is far better to err by traveling a longer road or taking more time than to err by depriving one of a fair trial for want of understanding or comprehension of what is taking place. This is especially so where a human right is at stake. The purpose of a criminal proceeding is not to convict but to deter-

mine innocence or guilt. Such having once been determined by a fair trial, what follows is an administrative matter.

We concur in the statement in the case of *Escobar v. State*, 30 Ariz., 159, 245 P. 356, and cases therein cited, to the effect that 'it is the fairer and better way for the court, either of its own motion in a capital case, or upon request in one of a lesser degree, to provide such an interpreter, and, if in any such case, the record indicates a failure to provide an interpreter has in any manner hampered the defendant in presenting his case to the jury, we shall hold a fair and impartial trial has been denied him.' "

We invite attention to the entirety of the above mentioned annotation in 140 A.L.R. 766, where additional pertinent authorities are collected. See also *Garcia v. State*, 210 S.W. 2d 574 (Tex. Crim. App. 1948), another murder case, where the conviction was reversed for refusal of the trial court to supply an interpreter for a defendant who did not speak or understand the English language, as having amounted to a denial of constitutional right. In *ex parte Cannis*, 173 P. 2d 586 (Okla. Crim. App. 1946), a rape case, the conviction was reversed on the ground of denial of "a fair and impartial trial" in that, *inter alia*, the accused had a limited knowledge of English and an interpreter was not appointed.

(The above mentioned murder cases are analogous here where *Nebbia*, a man past the age of 50, was facing what amounts to a lifetime sentence, and in fact received what in all likelihood will prove a lifetime sentence, twenty years.)

The Federal case law is, admittedly, less directly instructive than the above mentioned State cases (including those treated in 140 A.L.R. which we have not specifically re-

ferred to). However, the principle seems recognized in the Federal Courts, that on the basis of an operating though not necessarily articulated constitutional *assumption*, an accused is entitled to a court appointed interpreter in appropriate cases. E.g., *Perovich v. United States*, 205 U.S. 86, 91; *Hardin v. United States*, 324 F. 2d 553, 554-555 (C.A. 5, 1963); *Suarez v. United States*, 309 F. 2d 709, 712 (C.A. 5 1962); *Gonzales v. United States*, 314 F. 2d 750, 752 (C.A. 9, 1963).

We also respectfully repeat our earlier suggestion that the adoption of the new Rule 28(b) denotes a recognition of the constitutional justness of providing such interpreter services in Federal criminal proceedings.

The Court below rejected argument along the above lines by appellants; the rejection was on the grounds that Nebbia was not indigent; that *some* French-English help was assumed to be available through colleagues of defense counsel and that Nebbia's lawyer had done a good and vigorous job in the trial (Pet. Cert., App. A, pp. 25a-30a).

### POINT VIII\*

Petitioner Nebbia was denied a fair trial by the Court's instruction to the Jury, concerning alleged identification of Nebbia's voice in the tape recordings, which amounted to direction of a verdict on this crucial issue and prejudicially suggested that the tapes were of satisfactory acoustic quality.

In charging the Jury on the important point of the alleged identification of Nebbia's voice in the tape recordings, the Court said (66a):

\* This Point VIII, like our Point III, *supra* is relevant to the retroactivity issue as touching the "integrity of the fact-finding process."



"I think the evidence is pretty clear that the room in which the conversations took place was registered in the name of the defendant Nebbia. That much I don't think has been the subject of much controversy. Of course, you have to be convinced of it. You find the facts. I don't. But I think that that part of it is pretty clear. And the one voice that remained the same, speaking fluent French, has been identified as Nebbia's voice, and I don't think you should have too much trouble finding that one of the voice's was Nebbia's. But there again it is up to you to make that determination."

When defense counsel excepted to the above charge (115a-116a) the Court stated that it would supplement the instruction (*ibid*):

"Mr. Stream: \* \* \* I take exception, respectfully, to your Honor's reference to Nebbia and your Honor's statement that, to paraphrase your Honor, the jury should not find it to be too much trouble in concluding that one of the two voices during the Nebbia and Desist conversation was Nebbia.

I believe that the identification of those two persons goes to the crux of our case, talking about Nebbia.

We don't for one minute concede that the voices are and that the tapes are tapes of the voices of Nebbia, Desist or LeFranc.

The Court: You suggested one French voice was Kiere. I never heard you say in your summation that the other voice was not Nebbia.

What contention did you make on your summation?

Mr. Stream: I contended in my summation, your Honor, that there was no proof of identification by voices by Kiere, because he had to depend upon Smith, and there was no identification of either De-

sist, Nebbia or LeFranc by Smith because he was depending upon Kiere. So that there was a complete failure of identification except on a post-surveillance basis, when later identification by them produced this retroactive identification during these conversations, and I criticize that in my requests, which have been marked for identification.

The Court: I will tell them that if I referred to anything and said that they should have no difficulty, I was certainly not trying to impinge upon their fact-finding function and that these were merely respectful suggestions, not intending in any way to detract from their responsibility.

I will tell them that without repeating his allusion.  
Mr. Stream: Thank you."

The Court then gave a "corrective" instruction along the merely generalized lines it had proposed, making no reference expressly to the above quoted instruction concerning Nebbia; for example (121a):

"I made a comment when I said you should not have any difficulty. When I made that comment, I was doing something that I have the privilege of doing as a Judge of this court, but I also charged you and I again charge you with all the emphasis at my command that you are the exclusive judges of the facts, not I. You will decide what is easy to determine and what is not easy to determine, and I am not to decide it.

So please do not accept those suggestions as any kind of a charge or instruction that you are supposed to find certain facts in a certain way. It should not be understood, and my comments were not so intended."

In Point III, *supra*, we analyzed the items in this trial record which pertain to the issue of identification of the

voices of the alleged participants in the taped conversations, as part of our larger argument on the poor probative quality of this evidence.

It is submitted that the above quoted instructions to the jury deprived Nebbia of a fair trial, indeed of a trial by jury. The Court of Appeals did not speak on this point in its opinion (Pet. Cert., App. A).

## POINT IX

**All petitioners challenge the sufficiency of the evidence.**

As to petitioners Dioguardi and Sutera, this contention is supported in Points IV and V, *supra*. As to all petitioners, we respectfully refer to the recitals concerning each of them in the statement of the case, *supra*. As to Desist, we specifically refer to the item noted in Point III, *supra*, of alibi testimony by the witness Alriq and to the other defects in the Government's proof as to voice identification (Point III, *supra*). Further as to Desist, and as to LeFranc and Nebbia, we refer also to all of the probative defects in the electronic evidence as described in Point III. As to LeFranc and Nebbia we refer also, specifically, to the voice identification matters presented in Points III and VIII, *supra*. Further as to LeFranc, we refer to the incredibility of the proof concerning the alleged conversations with Dioguardi and Sutera at the Adano Restaurant, as treated in Points IV and V, *supra*; and to the deposition proofs by Messieurs Calle and Feischoz, supporting LeFranc's contention that his presence in this country was in connection with activities of a patriotic French-Algerian organization, not for nar-

cotics activities. And as to all of the petitioners we rely on the combination of all of the foregoing indicia of insufficiency of proof of the single conspiracy charged in the indictment.

## CONCLUSION

It is respectfully submitted that the judgment or judgments appealed from should be reversed and vacated, and the indictment dismissed; or that the case should be remanded for further appropriate hearing as to unconstitutional or illegal electronic monitoring.

Respectfully submitted,

ABRAHAM GLASSER

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ABRAHAM GLASSER

*Of Counsel*

**APPENDICES TO JOINT BRIEF  
FOR PETITIONERS**





## APPENDIX A

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### Relevant Statutes

Title 21 United States Code:

§173. Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.

It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19,

*Appendix A—Relevant Statutes*

or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

§ 174. Same; penalty; evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and in addition may be fined not more than \$20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient

*Appendix A—Relevant Statutes*

evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

**F.R.C.P. RULE 28(b)**

“(b) *Interpreters.* The Court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the Court may direct.”

APPENDIX B

**Affidavit of Electronic Consultant, Bernard B. Spindel,  
Filed in Court of Appeals**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 30849

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee.*

—against—

SAMUEL DESIST, FRANK DIUGUARDI, JEAN CLAUDE LEFRANC,  
JEAN NEBBIA and ANTHONY SUTERA,

*Defendants-Appellants.*

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STATE OF NEW YORK. }  
COUNTY OF NEW YORK } ss.:

BERNARD B. SPINDEL, being duly sworn, deposes and says:

I am an expert in the field of electronic sound detection, transmission and recording. I have qualified as such expert in numerous judicial, legislative and other official proceedings in various jurisdictions. I reside and have my business at Ludingtonville Road, Holmes, N. Y. 12531. I have been engaged by the attorneys for all of the above named appellants except Desist, as electronics consultant for the



*Appendix B—Affidavit of Bernard B. Spindel*

purpose of these appeals and of collateral proceedings which the attorneys advise me they are contemplating. The attorneys have also advised me that, although Desist's attorney is not participating in the retainer arrangements for the engaging of my services, as a courtesy to Desist and the latter's attorney any advice and findings which they may receive from me will be made available to Desist's attorneys.

I make this affidavit in support of the application of the appellants for permission to have me listen to the electronic tape recordings which were used in evidence in this trial or which produced evidentiary leads, or which were used in order to process filtered re-recordings.

Appellants' attorneys—hereinafter when I refer to appellants' attorneys I shall be referring specifically to Messrs. Stream and Glasser, with whom my direct contacts in this case have been had—have told me that the reason they want me to listen to these tapes is in order to enable me to advise them whether a playing of the tapes may indicate to me as an expert that the electronic eavesdrop installation was actually done in the manner testified to by the Government's witnesses, or whether instead the installation must have been done in some manner necessitating a penetration or trespass into the roomspace which was being electronically "bugged". After my initial consultations with Messrs. Stream and Glasser, in which I was shown the agents' testimony as to the eavesdrop installation, I introduced the suggestion that permission should be requested to allow me to listen to the tapes for the above purposes; and, as just

*Appendix B—Affidavit of Bernard B. Spindel*

indicated, the attorneys adopted the suggestion and are accordingly making this application.

In order to explain why my listening to these tapes is expected to reveal whether or not the eavesdropping was done in the manner claimed by the Government, it is necessary for me to present certain preliminary facts concerning this installation which have been brought to my attention:—

In a proceeding on May 4, 1966 presided over by Judge Palmieri, with the attorneys for the parties present, at Room 1600 of the Waldorf-Astoria Hotel in New York City, being the room occupied by the agents in connection with the electronic bugging of the adjoining room occupied by appellant Nebbia in December 1965 (Room 1602), Agent Durham reconstructed the eavesdropping equipment in what was represented as being exactly the same way as had been done at the time of the eavesdropping.

Agent Durham described the equipment as consisting of "a dynamic microphone made by Shure Brothers, known as a Model MC-11-J. It has an impedance of approximately 1700 ohms, and is matched precisely with this Concord Model No. 330 tape recorder and an amplifier that I personally had assembled here."

I pause at this point to note that particular attention should be concentrated on Agent Durham's above mention of "an amplifier" which was in addition to the microphone and the tape recorder. It will become clear, as I proceed, why I am directing attention to this additional amplifier item.

*Appendix B—Affidavit of Bernard B. Spindel*

Agent Durham went on to explain that the amplifier would act as a "pre-amplifier" to boost the power of the tape recorder when the eavesdropped sound signals dropped to a volume level too low to record normally on this particular tape recorder. Appellants' attorneys have also shown me testimony by Agent Durham, and by the agent who actually operated the eavesdropping equipment (Agent Kiere) after it was installed by Agent Durham, in which both of those agents apparently indicate in an unmistakable way that this amplifier or pre-amplifier was not intended to be used and was not actually used on a constant or continual basis, but apparently it had to be shut off from time to time "so that you don't overload the entire circuit" and produce "a feedback effect with a high piercing screech".\* For the reasons which I shall shortly mention, it may be stated as an incontrovertible scientific or technological fact that the installation described by Agent Durham could not have worked at all except with continual, uninterrupted use of the pre-amplifier.

The next item which I am now to mention is also of quite possibly decisive importance, for the purposes of a scientifically or technologically valid answer to the question of whether the installation could have been made and could have worked in the manner testified to by the agents. I refer to the further testimony, by Agents Durham and Kiere, that the installation was also equipped with what is known as a voice actuated function; this is a device for

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\* I am advised that in Mr. Stream's affidavit herein reference is made to the pages of appellants' printed appeal briefs where all of the agents' testimony which I am here quoting or describing is cited.

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automatically "triggering" the listening installation when a certain sound level is reached. The importance of this fact, for the purposes here involved, is that this automatic "triggering" voice-actuated device would start the tape recorder going when the requisite sound level was reached in the agents' own room at the Waldorf-Astoria, and not only when that sound level was reached in the room that was being bugged; in fact the voice actuation function would be even more sensitively triggered by noises in the agents' own room than by noises in the room being bugged, if in fact the microphone installation was inside the agents' room as they testified rather than being located (penetrationally or otherwise) in the adjoining room. So that, if the testimony shows that significant sound-producing activity was occurring in the agents' room, and if in turn such sounds do not appear on the tapes, there would immediately arise at the very least a strong suspicion that the microphone could not have been located inside the agents' room as they have testified was the case. And in fact the record reveals that there was in the agents' room very significant sound-producing activity indeed, including extensive use of a typewriter, likewise extensive use of a two-way radio which was operated at a very loud volume, and other activity. Mr. Stream, who I am told has heard these tapes played during the trial, advises me that they do not reveal such sounds of typewriter, radio, etc., and that while they do contain extraneous noises, such consists of street traffic noises, an occasional extraneous voice noise, and the like.

With the above items in mind as to the technological character of the apparatus used according to the agents' testimony, I now respectfully invite attention to one fur-

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ther feature as to the physical way in which the microphone portion of the apparatus was said to have been installed. The agents testified that the microphone was attached by tape to the bottom of a door between rooms 1600 (the agents' room) and 1602 (Nebbia's room), i.e., it was attached in such manner as to be physically located entirely within the room space of the agents' room; further, that between the bottom of said door and the floor there was an aperture of about  $\frac{3}{8}$  of an inch, the microphone being tilted at an angle of about 45 degrees from the door towards the floor so as to cup sounds received through the  $\frac{3}{8}$ " aperture; that a towel was kept draped over the microphone to muffle sounds coming from directions other than the  $\frac{3}{8}$ " aperture; and that the wire from the microphone led to the amplifying and recording equipment which in turn was located in the bathroom of the agents' room. The testimony further states that Agent Durham claims to have installed the microphone in this manner without having first ascertained just what was the physical situation beyond the  $\frac{3}{8}$ " aperture at the bottom of the agents' own door. This last is important because, concededly, the door arrangement between the agents' and Nebbia's room was a double-door arrangement with a narrow airspace in between; and Agent Durham, the installing expert, has sworn that, aside from having been told (merely as a general fact, apparently) by Agent Kiere that it was a double-door arrangement, he had no other knowledge of any of the physical circumstances



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whatever as to this double-door arrangement.\* Agent Durham did not even know whether Agent Kiere's knowledge about the existence of a double door was based on the latter's having opened the agents' door to look at the setup; Agent Durham had seen no plans or drawings that would reveal the setup of the double door; he had not looked through the small airspace at the bottom of the door opening into the agents' own room; he had not even examined "that space at all"; he did not "check to see if that airspace was clear to the next room", nor even had anybody told him whether it was; except by his judgment based on the performance of the equipment, "there could have been a solid wall on the other side of that with no airspace, as far as [he] knew"; nor did he know the thickness of the door to which he swore he attached the microphone, or the thickness of the space between the double doors, nor had anyone informed him as to these items; and he had installed the equipment "right there" without testing it beforehand to see whether it would record sounds coming from the other room.

As an expert in this field I respectfully aver that it is incredible to me that any other qualified expert in this field would go about making an installation of this type on the basis of the lack of knowledge of the physical setup as stated by Agent Durham. I am informed by Mr. Stream

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\* I am informed by Mr. Stream that in the brief of appellant Nebraska in this appeal, pp. 26-27, Agent Durham's testimony is shown to have been apparently evasive, at first, even as to the question of whether he knew at all, when he installed the microphone in the manner claimed, that there was a double-door at all rather than a single door.

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that the appellants contend that, partly on the basis of this expert opinion of mine, together with other circumstances which I am informed are set forth at pages 9-37 of Nebbia's brief and at pages 5-8 of the Dioguardi-Sutera brief in these appeals, the appellants are entitled to request a further judicial exploration of the question of how the bugging of Nebbia's room was actually done—that is, whether it was done in the way the agents state, or by a penetrational or otherwise "trespassory" invasion of Nebbia's roomspace.

Before I come, finally, to my averment of the technological reasons why my hearing of the tapes could produce objective scientific indications as to the way in which the bugging of Nebbia's room was actually carried out, I would respectfully touch upon the following further areas of factual detail in regard to items which I have previously mentioned in a more general way:—

*First*, as to Agent Durham's above noted description of the technical specifications of the units used in the eaves-dropping apparatus, it will be recalled that Mr. Durham said he used a "dynamic microphone, made by Shure Brothers, known as a Model MC-11-J", and that this unit has "an impedance of approximately 1700 ohms, and is matched precisely with this Concord Model No. 330 tape recorder and an amplifier". There are several difficulties, to the mind of an expert, in these statements of Agent Durham. To begin with, the Shure Model MC-11-J does not have "an impedance of approximately 1700 ohms", which would be what is known in my field as a relatively "high" impedance, but it has an impedance of 1000 ohms (see, e.g., the standard catalogue of Harvey Radio Co. Inc. (1964),

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p. 287, bottom of third (last) column, stating the specifications of the Shure Model MC-11-J). Thus, and again merely to begin with, Agent Durham's description of his MC-11-J microphone, is a description of an item which does not exist. But passing this circumstance as possibly not being decisive, and accepting that Agent Durham did in fact use an MC-11-J microphone, i.e., assuming that he did use this "low impedance" 1000 ohms microphone, it would then follow as a matter of inescapable technological necessity (as I earlier averred) that this microphone could not work at all in the overall installation described by Agent Durham unless the amplifier (or pre-amplifier) which he also described was kept in operation on a continual or constant basis, because without such pre-amplification the MC-11-J does not "match" with the "Concord Model No. 330 tape recorder", the latter being a "high impedance" unit which could not work with the "low impedance" MC-11-J except through the boosting power of a pre-amplifier. And, as seen, both Agents Durham and Kiere testified in such manner as apparently to compel the conclusion that the pre-amplifier was not used on a constant or continual basis during the times when the tape recorder was recording. From all of this the virtually inescapable inference, to me as an expert, is that the agents must have used a high impedance microphone; or, as the only possible alternative, that the agents have simply not correctly described the equipment they used or the way in which they used it, and in such latter alternative event the appellants' position would be, I am informed by Messrs. Stream and Glasser, that this very incongruity in

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the agents' testimony favors an expert audition of the tapes to probe into what may actually have been done.\* Pursuing one step further my above theme that indicatedly the agents must have used, by virtually inescapable inference, a high impedance microphone, I must respectfully add this, that there does not exist any such high impedance microphone of anywhere near the small physical size of the MC-11-J type depicted by the agents as having been used in the kind of door-taped installation here involved; and the only extant kinds of high impedance microphones which could have accomplished the eavesdropping job here claimed to have been done would have had to be of the, "spike mike" type—or some type of "bug" located inside Nebbia's room.

*Second*, there is the problem of the narrow airspace between the two doors. I am informed by Messrs. Stream and Glasser that, based on our consultative discussions heretofore, they have presented, at pp. 5-8 of the Dioguardi-Sutera brief and at pp. 9-37 of the Nebbia brief in these appeals, some discussion of the technological facts of the so-called "parabolic mike". I have advised Messrs. Stream and Glasser that, given the kind of angle-tilted microphone installation at a double-door arrangement of the type here involved, in other words taking it to be the fact that the eavesdropping was done in the manner stated by the Government, such eavesdropping was done by the method of a "parabolic mike". This suggestion of mine that the installa-

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\* I here respectfully interject that when I thus refer from time to time in this affidavit to appellants' positions or contentions deriving from the technological aspects of the situation, I am of course denoting that such has evolved out of the technical consultative discussions between appellants' attorneys and me.

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tion (as claimed by the Government) was of the "parabolic mike" type, is based on the following objective technological considerations:— The narrow airspace between the two doors constituted, under the circumstances here involved, what we electronic technicians call a "sound chamber". Sounds coming from Nebbia's room would not merely go through a small aperture at the bottom of Nebbia's own door (if there was any such aperture, which Agent Durham, as seen, said he never ascertained in any event), but, much more important, such sounds from Nebbia's room would vibrate against his own door to be thence vibrationally transmitted into the narrow intervening airspace between the two doors (what I have termed a "sound chamber"), whence those now sound-chamberized sounds would be picked up (theoretically, if the Government's description of its installation is correct) by the tilted microphone at the bottom of the agents' door. The angularly rebounding or multiply resounding acoustical process through which these sounds would pass inside the narrow airspace or "sound chamber" between the two doors, combined with the sound-receiving function of the tilted microphone, would result, in short, in a classic instance of the functioning known as the "parabolic mike". My point in going into this quite technical phase of the matter is not, in this present affidavit, to establish that a technical "trespass" thereby did in fact take place or must have taken place (on the Government's own theory of how it bugged Nebbia's room) because this latter is to be taken up by appellants' attorneys, they informed me, in connection with a subsequent more comprehensive application that they are planning to make to this



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Court and to the Department of Justice based on the technological circumstances of an invasion of Nebbia's privacy-designed rights in the double-door arrangement with its intervening air cushion; that is, I am not endeavoring in this affidavit to address myself to the ultimate conclusion of whether in fact this electronic invasion of what was intended as a privacy barrier was converted into a privacy-invasion instrumentality through the technology of this "parabolic mike". What I am addressing myself to in this regard is the narrower, presently more pertinent question of whether, by my hearing the tape played, I would be able to make an expert detection that the sounds recorded on the tapes reveal a "parabolic mike" type of recordation (and microphonic reception) in the manner above suggested. If such should be revealed by my hearing of the tapes, appellants' attorneys would be to that extent in a more informed position to urge their contention of "trespass" by reason of the use of a "parabolic mike".

*Third*, in connection with the door-taped and angle-tilted method in which the MC-11-J microphone is stated by the Government to have been used, I would now respectfully add the following:—This was concededly what is known as a "multi-directional" microphone. That is, the microphone would pick up sounds originating in the agents' room, and not only sounds originating in Nebbia's room; this has been previously mentioned, but I am now respectfully inviting attention more specifically to the "multi-directional" feature which underscores the point as to the picking up of sounds from the agents' room. As also previously noted, those sounds from the agents' room were very significant

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ones indeed; and if those sounds are not present, in reasonable commensurateness with the quantum of their actual occurrence, as testified to by the agents (the typewriter sounds, the radio sounds, etc. previously herein mentioned), then, bearing in mind the "multi-directional" functioning of the microphone said to have been used—and notwithstanding, I may categorically state, the attempted muffling of the microphone by draping a towel around it, this being quite ineffectual to muffle the essential multi-directional reception of this type of microphone—such absence of those agents' room-originating sounds from the tapes would of necessity point to the strong probability that no such multi-directional microphone could actually have been located in the agents' own room.

I may now turn to the final specific technological details of the procedure which appellants' attorneys and I contemplate in the event the within application to allow me to listen to the tapes should be granted. There is an instrument employed by expert practitioners in my field known as the electronic oscilloscope, which, when used in auditing electronic tape recordings of the present type, can detect electrical or magnetic impulses on the tapes which are not visible to the eye of a person visually examining the tapes or to the unaided ear of the listener. The oscilloscope can reveal signals which cannot be detected by any other means. The results revealed by the oscilloscope to a trained user of that instrument, combined with the trained auditory abilities of an expert like myself utilizing the experienced alertness of his ear and his mind in carrying out both the oscillograph procedure and the conventional listening procedure, can

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enable such a trained listener to perceive on the basis of a detailed demonstrable electronic and auditory analysis (which of course could be formulated in the form of sworn testimony referring to all of the relevant technological items) significant indications as to the actual nature of the eavesdropping installation used.

The above described procedure for having me listen to the tapes, as desired by appellants' attorneys, would enable me also as an expert to detect any erasures, splicings or other tampering with the tapes. I am advised by Messrs. Stream and Glasser that, while detection of such last mentioned possibilities is not their primary object in making the present application for allowing me to listen to the tapes, such is one of their objects as a part of their overall contemplated procedure in connection with any collateral proceedings before the Department of Justice in Washington, D. C., which may be appropriate by reason of what I am informed those gentlemen have referred to in their appeal briefs herein as the new "Schipani" electronic eavesdrop administrative review program. More specifically, Mr. Glasser in particular has informed me that, in connection with appellants' contention in the brief of LeFranc that the tapes are pervasively inaudible and unintelligible, and that the admitted re-processing of the Nebbia-Desist tape to filter out background noises presents additional questions of authenticity and genuineness of that tape and perhaps of the entire eavesdropping activity, appellants' attorneys are definitely desirous at this time of having my opinion on the questions mentioned in this paragraph; and that for this purpose they desire to have me listen to the tapes.

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In conclusion, I realize full well how important it is that I address myself in the most specific way to the question of whether the procedure above proposed for my listening to the tapes might damage the tapes in point of their future evidentiary use. I have discussed this problem in the most careful and thorough way with Messrs. Stream and Glasser, and they have authorized me to assure the Court and the Government that, in the first place, the appellants are willing that the following be done:— Before any playing of the tapes for my audition, the Government, using apparatus of its own selection, may run off, in the presence of appellants' counsel (with myself present as their electronic consultant), one or more copies or duplicates of the original tapes; such copies or duplicates would then be played back so that all interested parties may agree on the fidelity of such copies or duplicates (and appellants would interpose no obstructive or otherwise unreasonable opposition on such question of the fidelity of the copies); appellants would then stipulate (so their counsel inform me) that, in the event of any good faith claim by the Government in the future that damage occurred to the original tapes in the course of their having been played for my listening, the above mentioned copy or copies of the tapes would be admissible for evidentiary use in lieu of any such damaged original. However, I must also respectfully inform the Court that there is actually no realistic chance that the original tapes could sustain any damage whatever from the listening procedures which the appellants are herein requesting. Neither the oscilloscope procedure nor the general listening procedure above outlined presents any danger of damage to the tapes; only some completely unanticipated

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and altogether unlikely mishap could hurt these tapes upon their being replayed in the manner herein proposed; and that danger is no more than the normal danger which is intrinsically present in any re-play procedure. With the meticulous care that may be expected from the Government's personnel, and with the comparable expert care which I assure the Court I shall myself observe, the occurring of any damage to these tapes if they are re-played as herein requested is an altogether negligible possibility.

BERNARD B. SPINDEL  
Bernard B. Spindel

Sworn and Subscribed to  
before me this 3rd  
day of January, 1967.

MILTON C. WINKLER

Milton C. Winkler

Notary Public, State of New York

No. 31-9704765

Qualified in New York County

Commission Expires March 30, 1968



**APPENDIX C**

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**Letter of Appellants' Counsel, Abraham Glasser, to  
Clerk of Court of Appeals, May 1, 1967,  
Re Electronic Eavesdropping**

ABRAHAM GLASSER  
52 Eighth Avenue  
New York, N. Y. 10014  
May 1, 1967

HONORABLE A. DANIEL FUSARO, *Clerk*  
UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT  
UNITED STATES COURT HOUSE  
Foley Square  
New York, N. Y. 10007

Re: U.S.A. v. Samuel Desist, et al.  
Docket No. 30849

DEAR MR. FUSARO:

On April 28, 1967 I wrote to you, on behalf of counsel for all appellants in the above case, that we would send to you not later than May 2, 1967 a further letter for the attention of the Panel relating to United States Attorney Morgenthau's letter of April 27, 1967.

Mr. Morgenthau's last-mentioned letter states, in essence, (a) that the present Department of Justice policy as to electronic monitoring is that the Department's "duty to disclose turns on whether something that is arguably ma-

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terial has been discovered”—apparently the United States Attorney thereby is suggesting that disclosures made in the April 27 letter did not need to be made previously; (b) that no trespass was committed in the monitoring of appellant Nebbia's Waldorf-Astoria Hotel room in December 1965; and (c) that two additional instances of electronic monitoring occurred.

Each of the above three items or topics in Mr. Morgenthau's April 27 letter calls for comment, but before presenting comments it will be convenient to review some of the background of the situation in which the April 27 letter (*supra*) is the latest development.

(Except as the context will otherwise indicate, the following background recitals are based on papers previously filed by us in these appeals or in the supplementary "Schipani" motion proceeding.)

The pertinent chronology begins with a pre-trial session on April 27, 1966 before Judge Palmieri (R.3151-3205; Nebbia Brief, p. 21). On that occasion the Government announced that there had been electronic eavesdropping—later identified as the Waldorf-Astoria incident. Judge Palmieri then suggested (still at the pre-trial hearing of April 27, 1966) that "I think the first order of business would be a precise and complete reproduction of the eavesdropping technique and method" (R.3157). The following colloquy then occurred (R.3157-3161):

"Mr. Maurice Edelbaum: That would be assuming, of course, that the eavesdropping took place only in this jurisdiction. If it took place in other jurisdictions I think that might present some problems.

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The Court: I will ask Mr. Tendy.

Mr. Tendy: The only eavesdropping—I know of none that occurred outside of the Southern District of New York. There was none in Georgia, for example. There was none in Florida. There was eavesdropping resorted to here in New York City.

The Court: I take it that you had pre-trial conferences with the agents in the case and that you have seen their reports.

Mr. Tendy: I have seen their reports, yes, sir.

Mr. Maurice Edelbaum: Was there eavesdropping outside of the country?

Mr. Tendy: The only eavesdropping that I'm familiar with occurred right here in this district.

The Court: When you say "this district," you mean Manhattan?

Mr. Tendy: Yes, it occurred only in Manhattan. If there was something in, let's say, Brooklyn or Queens or any place else, of course I will promptly bring this to the attention of the court.

The Court: So far as you know the only eavesdropping occurred in Manhattan?

Mr. Tendy: Yes.

The Court: At one or more sites?

Mr. Tendy: Let me check with Agent Fitzgerald.

The Court: We have got to organize this expedition for observation. If there are many separate sites it may involve more than one section.

Mr. Tendy: I think there was just one resorted to, your Honor, at one site. I'm quite certain of that.

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Mr. Philip Edelbaum: I have already served motion papers in relation to this very subject. Would there be any need of making new motion papers?

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The Court: No, you need not.

Mr. Philip Edelbaum: At that time the motion was not only to suppress eavesdropping but to suppress any possible wiretapping. Mr. Tendy never stated one way or the other whether there was wiretapping.

Mr. Tendy: Let me state now there was none. When I use the term electronic listening devices I use it generically to cover anything that counsel might have in mind. I feel that is only my obligation.

Mr. Maurice Edelbaum: Specifically, you are telling us now that there was no telephone interceptions of any kind?

Mr. Tendy: No.

Mr. Maurice Edelbaum: All right, that is sufficient.

Subsequently, in the pre-trial session of June 8, 1966, pp. 259-260\*, where defense counsel were examining one of the narcotic agents as to how they knew Nebbia was planning to stay at the Waldorf-Astoria, the following occurred:

"Q. Then you received this information on the 14th, that he would be possibly staying at the Waldorf-Astoria? A. Yes, sir.

Q. How did you derive that information, sir?

Mr. Tendy: Objection.

The Court: Sustained.

Q. Was that through electronic equipment?

Mr. Tendy: Objection.

The Court: Sustained.

Mr. P. Edelbaum: Your Honor, on Mr. Jones' question, I think we are entitled to know if there

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\* In further referring to the pre-trial eavesdrop proceedings we shall use the original stenographic page numbers except for the session of April 27, 1966 above mentioned.

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is any other electronic eavesdropping in this case other than the one Mr. Tendy stated there was.

The Court: You have already gotten that. It was a formal representation in one of the first pre-trial sessions we had in the case. I remember distinctly that Mr. Tendy made a formal representation to the effect that the only use of electronic equipment was this and that he would make full disclosure of it.

Is that correct, Mr. Tendy?

Mr. Tendy: That is correct, your Honor.

Mr. P. Edelbaum: I realize that, your Honor, but there have been other things that were brought out and Mr. Tendy stated that certain things, like some magazine articles, he wasn't aware of. Maybe there was electronic eavesdropping that this agent is aware of—

The Court: If we are going to do that we might as well go over to 90 Church Street, question every doorman, every stenographer, every charwoman, every agent in the Bureau and we may get to trial in this case several years from now.

Here is a responsible representative of the government who states that there was no use of any electronic equipment other than this eavesdropping equipment and that he was making full disclosure of all the electronic equipment that was involved in this case."

The pertinent chronology now skips over the entire trial and all other proceedings down to the eve of the perfecting of the within appeals—for throughout all that time defense counsel had been proceeding on the Government's assurance, as above quoted, that there had been no other elec-



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tronic monitoring. The briefs of several of the appellants in these appeals, filed in December 1966, re-opened the question of the acceptability of the Government's factual description of the Waldorf-Astoria monitoring techniques (Nebbia Br. pp. 9-37; Dioguardi and Sutera Br. pp. 5-8). Likewise in those briefs, and in supplementary motion papers for appellants filed, respectively, on January 4 and 10, 1967—prior to oral argument of these appeals, which was held January 19, 1967—we requested "Schipani"-type review on a *de novo* and comprehensive basis to find out what the Government had actually done by way of electronic monitoring in this case; we of course did not expressly contend, as we were not then in a position to do so, that additional monitoring had occurred, but we did suggest the possibility and requested further inquiry on the Government's part (Nebbia Br., p. 21, 4th fn.; "Affidavit In Support Of Motion For Supervisory Orders *Re Electronic Eavesdropping Issues, Etc.*", sworn to by Abraham Glasser January 10, 1967, p. 11, par. K).

Neither in the Government's printed brief herein, filed shortly before the oral argument of January 19, 1967, nor in its affidavits of January 5 and January 19, 1967, nor in its oral argument on January 19, nor in its letter to the Panel dated February 15, 1967, was mention made of any other electronic monitoring. Indeed, in the letter of February 15, 1967, the United States Attorney stated that the Schipani "review procedure was undertaken with regard to this case and no notification has been made to this Court because our inquiry has produced no information within the scope of *Schipani v. United States*": (We are not overlooking that, as above noted, in his latest letter of April 27,

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1967, the United States Attorney is apparently suggesting that Department of Justice policy was being followed when disclosure of additional monitoring was not made in the letter of February 15, 1967; we return to that interesting suggestion late in this letter, after completion of these chronological background recitals.)

The next pertinent item, chronologically, was our "Motion For Permission To File Supplemental Statement For Appellants After Oral Argument", supported by affidavit of Abraham Glasser sworn to March 27, 1967. In that motion we asked the Court to consider whether the United States Attorney's letter of February 15, 1967 (*supra*) was a satisfactory response to the "Schipani" problems that had been posed to the Government in this case. (In our latter motion of March 27, 1967 we referred also to communications which had taken place between Mr. Glasser and the McClellan Committee concerning President Johnson's order of June 30, 1965; we shall return to this subject *infra*.)

The next pertinent development was the letter of April 18, 1967 from Mr. Fusaro to the United States Attorney requesting clarification of the United States Attorney's letter of February 15, 1967.

And the final development (until now) was the United States Attorney's above mentioned letter of April 27, 1967.

Chronologically paralleling the above summarized happenings in the present appeals has been the gradually unfolding policy of the Department of Justice in Washington in its successive presentations to the Supreme Court commencing with the *Black* case. This unfolding policy of the Department has significance here from several aspects, all

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of which will be touched upon in the course of this letter, but for the moment we confine ourselves to the unfolding of the departmental policy as to the duty to disclose—the topic with which Mr. Morgenthau's latest letter herein (April 27, 1967) commences. In *Black* the Solicitor General was responding to an order of the Supreme Court to make disclosure, and apparently full disclosure was made. In *Schipani* the Solicitor General announced the important new Departmental policy of voluntary disclosure of "the instances in which there might have been monitoring affecting a case which has been brought to trial" (Supplemental Memorandum for the United States, p. 5). The precise scope of this newly announced policy of voluntary disclosure was, we admit, unclear, i.e., the Solicitor General's Supplemental Memorandum in *Schipani* did not expressly commit the Department to a self-imposed duty of plenary disclosure of any and all instances in which electronic monitoring had been done or attempted; the pertinent language in the Solicitor General's Supplemental Memorandum in *Schipani* appears at pp. 4-5 thereof, including the footnote. However, it was shortly to become clear that the Department of Justice in Washington interpreted its duty of disclosure in a plenary sense.

Thus, in the "Brief For The United States" in response to the petition for certiorari in *O'Brien and Parisi v. United States*, October Term 1966, No. 823, the Government's brief being dated February 1967, the Solicitor General made what we think we may fairly term plenary disclosure. We understand that this Court has copies of the O'Brien-Parisi "Brief For The United States", where the pertinent matter appears at pp. 10-12. We note that in that

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Brief the Government contended that the electronic monitoring in one instance "was not mentioned in any F.B.I. report nor were its contents communicated to attorneys for the Department of Justice, including those who prosecuted this case"; that in another instance the monitoring overheard only a conversation between O'Brien and one of his attorneys relating to the territorial conditions of O'Brien's release on bail and that this conversation "was not communicated in any manner outside the F.B.I."; and that the monitoring affected only O'Brien, no conversation of Parisi being overheard, but that the Solicitor General nevertheless told the Supreme Court, "we do not oppose the same disposition of [Parisi's] case as is afforded to petitioner O'Brien" (this last appears at p. 12, fn. 5 of the Government's brief in *O'Brien-Parisi*). As this Court is aware, the Supreme Court granted certiorari, vacated the judgment, and remanded the *O'Brien-Parisi* case for a new trial should the Government seek to prosecute anew; Justices Harlan and Stewart, in dissenting, would have preferred to remand the case to the District Court "for a full hearing as to the circumstances and effect" of the electronic monitoring (35 U.S. Law Week 3329-3330; 18 L.Ed2d 94)—so far as appears, the Supreme Court's disposition of the case applied to both *O'Brien* and *Parisi*, notwithstanding Parisi's supposed lack of "standing", as to which the Solicitor General had expressly relinquished any contention, as seen.

Next, in *Granello and Levine v. United States*, October term 1966, No. 750, the Solicitor General again made a voluntary plenary disclosure ("Brief For The United States In Opposition", pp. 16-21). Since we understand



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that this Court has copies of the Solicitor General's brief in *Granello-Levine*, we shall not here quote from that brief. The brief is dated April 1967. For the first time the Solicitor General, in *Granello-Levine*, proposed a theory for differentiating the monitoring cases on the basis of whether any attorney-client conversation was overheard. The Solicitor General also urged in *Granello-Levine*, that the monitoring had not taintingly penetrated the trial proofs. But it seems to us that the most significant point made by the Solicitor General in *Granello-Levine* was that the monitoring had related to an altogether separate case involving Levine alone (no monitoring had applied to Granello at all). Still, three Justices dissented from the denial of certiorari in *Granello-Levine* (the Chief Justice and Justices Douglas and Fortas—and Mr. Justice Brennan, whose "predictable" vote would hardly have been in doubt, disqualified himself) (35 U.S. Law Week 3376-3377, April 25, 1967). As is well known, it is a fruitless occupation to speculate on the question of why the Supreme Court denies a writ of certiorari (*Supreme Court Practice*, 3rd Ed., Stern and Gressman, pp. 179 *et seq.*). Perhaps more fruitful would be the speculation that if Justice Brennan had not disqualified himself in *Granello-Levine*,\* certiorari would have been granted—the convention being that certiorari is granted on the vote of four Justices. We do not wish to speak impertinently, but if the Government is trying to persuade this Court that the denial of certiorari in *Granello-Levine* "safely" portends a similar denial in the

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\* The New York Times in reporting the case on April 25, 1967 stated that the reason for Justice Brennan's disqualification was that his son was of counsel for one of the petitioners.



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present case (in the event of an affirmance by this Court), we respectfully suggest that the Court will doubtless wish to scrutinize for itself any such offered persuasion on the part of the Government.

With the above two-fold background in mind—i.e., the concurrent chronologies of this case and of the Solicitor General's and the Supreme Court's joint working-out (as it were) of the new Federal constitutional policy as to electronic monitoring—we may now take a closer look at the United States Attorney's letter of April 27, 1967.

*First*, as regards the United States Attorney's introductory remarks in that letter concerning the *Granello* case and the disclosure standard of "whether something that is arguably material has been discovered", we must respectfully point out that it is a little late for the United States Attorney to try to justify, as apparently he is trying to do, the prior non-disclosure of the additional monitoring in this case. The Solicitor General's position in *Granello-Levine* is not helpful to the United States Attorney. It is not helpful either in point of chronology or in point of substance. Chronologically, as we think was above demonstrated, the Department of Justice in Washington committed itself at least as early as February 1967, in *O'Brien-Parisi*, to plenary rather than to parsimoniously calculated disclosure. Even in *Granello-Levine*, as recently as April 1967, the Solicitor General was continuing to make such plenary disclosure. Not so, however, it seems, the Southern District of New York. We do not wish to speak unjustly. The United States Attorney has not told the Court, or us, just when he learned of the additional moni-

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toring. All we know is that in his letter of February 15, 1967 he spoke, in apparently unqualified words, of the generally projected "extensive review" *a la Schipani* as having been "undertaken with regard to this case and no notification has been made to this Court because our inquiry has produced no information within the scope of *Schipani v. United States*"; that on March 27, 1967 we filed motion papers asking this Court to press the United States Attorney further with a view to clarification of the letter of February 15, 1967; that on April 18, 1967 Mr. Fusaro wrote to the United States Attorney requesting clarification as to "any trespass committed in connection with the monitoring in the above case"; that continuously prior thereto and since the time of the pre-trial proceedings in April-June 1966 before Judge Palmieri everyone had been assured by the United States Attorney's Office (on the basis moreover, apparently, of definitive consultation with the Narcotics Agents) that no other electronic monitoring had occurred; that in the relatively recent interim of some five months since *Schipani* the Solicitor General has been voluntarily making plenary and unstinting disclosure while in that same period the United States Attorney for the Southern District has proceeded along the lines above described; and that now at last, being brought to grips (it appears) by this Court's persistent interrogation, the Government has disclosed the two additional instances of monitoring revealed in the letter of April 27, 1967. We repeat, the explanation for the Government's tardiness of disclosure may well reside in the chronology of its own *Schipani* review investigation, that is, quite possibly, the disclosures of additional monitoring in the letter of April 27, 1967 did not come to

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light at a significantly earlier date. Still, one's mind is disturbed concerning this problem when one ponders the overall evolution above described in regard to this case, and especially when one ponders the United States Attorney's opening sentence in the nature of an apparent apologia in the letter of April 27, 1967—the reference to the *Granello* case. Perhaps we have mentioned somewhere in our prior papers herein—we do not now recall—Edward Gibbon's charming understatement in the "Decline and Fall", where the author was referring to a certain medieval monkish authority, and, Gibbon remarked, "A melancholy doubt obtrudes itself upon the reluctant mind". We hasten to add that, surely (and with unqualified sincerity), we are not for one moment suggesting that the United States Attorney's office for the Southern District has deliberately, or in any other sense unworthily or improperly, withheld from this Court or from the appellants disclosure of information which that office deemed "material" in law or in fact. What we are saying, rather, is that the United States Attorney's office is indicatedly revealed as having been wrong—well-meaningly wrong, we willingly state—in its whole basic thinking about this problem of disclosure. The prosecutive diligence which may have prompted this wrong thinking on the part of the United States Attorney's office is understandable; this has been, after all, probably the most horrific single case of heroin importation in recorded prosecutive history in this country, and no prosecutor worth his salt would do other than strive to the utmost by all proper means to preserve judgments of criminal conviction in such a case. But if constitutional impropriety has occurred here, as we maintain, the issue transcends the un-

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disputedly high value of prosecutive *esprit de corps*. We go further, in our ungrudging acknowledgement of the ethically unassailable motivations of the United States Attorney's office. We do not doubt for one moment that the United States Attorney himself and all of his attorney staff members who have been engaged with him in this matter, have been truthful in each and every representation that they have made in these proceedings. What we question, and all that we question, is the following two things: (1) Have the Narcotics Agents lived up to their own full duty of "disclosure" to the United States Attorney's office; and (2) has the United States Attorney's office shown sound legal judgment in its interpretation of the Solicitor General's policy of "Schipani" disclosure on a plenary basis?

Second, if we are correct in the suggestions offered in the last preceding paragraph, that is, if indicatively the Narcotics Agents have fallen short of their own duty of disclosure to the United States Attorney, and if the latter official and his aids have failed in sound legal judgment as regards the proper scope of "Schipani" disclosure, then it seems to us that the following further questions must unavoidably be faced in this case:— When the United States Attorney states to this Court, as he has done in his letter of April 27, 1967, that "there was no trespass committed in the monitoring litigated at the trial and at issue on appeal", and considering (as one must) that this representation by the United States Attorney (unimpeachable though we concede it to be insofar as it comes from the United States Attorney) is of necessity based on information from the Narcotics Agents, is one not entitled to ask that the representation be judicially scrutinized *de novo* in



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a proper adversary hearing where the Narcotics Agents may be questioned anew with a view to eliciting the full facts as to all of the disturbing circumstances brought forward in our briefs and in our prior motion papers herein? Why should the conclusory representation in the United States Attorney's letter of April 27, 1967 that "there was no trespass committed" be taken as being without further judicial recourse, when we all know that this conclusory assurance of the (unchallengeably honorable) United States Attorney stands or falls on the assurances which he in turn has received from the Narcotics Agents? Is it not, really, unthinkable, in all of the circumstances here presented, that a final, judicially determinative conclusion of "no trespass" should become lodged in this case without a further full-scale adversary judicial hearing in which the Narcotics Agents may be examined by defense counsel—and preceding which hearing the defense would have been given the opportunity (requested in our herein pending motions) *to have the tapes audited by our electronic consultant and to inspect the "Schipani"-review records of the Department of Justice in regard to this case?* Do not the actions taken by the Supreme Court in *Black*, *Schipani*, *O'Brien-Parisi* and (with acute division of the votes of the Justices) in *Granello-Levine*, raise the strongest kind of warning that mere representations by a United States Attorney's office *conclusorily* assuring that there has been "no trespass" will be insufficient to avert the grant of certiorari if not outright vacating of judgment, the circumstances which point to an opposite conclusion being so disturbingly substantial (again we are referring to our previous papers filed herein)?



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*Third*, as to the two additional instances of electronic monitoring belatedly disclosed in the United States Attorney's letter of April 27, 1967, we submit as follows:— The United States Attorney's statement that on December 18, 1965 in Columbus, Georgia, Narcotics Agents installed an electronic device in an automobile prior to its rental by Nebbia, that the device did not work and resulted in no overheard or recorded conversations, and that the United States Attorney's office had no knowledge of this installation at the time of the trial herein, is, we must again point out, evidently of a conclusory nature, and evidently also in turn based upon information given to the United States Attorney by the Narcotics Agents,—that is, of course, except for the United States Attorney's last noted statement that his office had no previous knowledge thereof, which we of course do not challenge. However, the United States Attorney's letter does not state when his office did obtain the knowledge. Accordingly, our earlier suggestion is here applicable, to wit, that if the United States Attorney's office has been in possession of such knowledge during the herein operative "Schipani review" which has coincided with the pendency of these appeals and disclosure has been deferred until now, the questions we have posed as to the soundness of the legal judgment of the United States Attorney's office in its interpretation of its duties under the Schipani procedure may again be mentioned. But more important, are we not entitled, in view of the totality of the circumstances of this case, to ask that appropriate provision be made to afford us an effective adversary opportunity by judicial hearing to explore the issue of the allegedly abortive automobile monitoring in Georgia for which, again, the only

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apparent basis of the United States Attorney's self-excusing representations derives from representations made to him by the Narcotics Agents? Should we not be afforded a full judicial opportunity to question those gentlemen of the Narcotics Bureau? The United States Attorney has felt justified in telling this Court the result of his questioning of the Narcotics Agents on this intriguing, belatedly disclosed revelation of electronic monitoring. Is it conceivably consistent with the recent program of *Black-to-Granello*, which the Solicitor General and the Supreme Court have jointly been mapping out, that an extraordinary revelation of this kind should be allowed to result in final, *unadjudicated* "repose" for the Government's ardent prosecutive officials without first affording to the opposing side a chance to ask its own questions, under proper judicial supervision, with a view to finding out whether the investigative agents of the Narcotics Bureau have given to the United States Attorney a reliable picture, and whether the United States Attorney has made a legally and factually sound interpretation of what the Narcotics Agents have told him? It has not been our impression that the "Schipani review" procedure operates in quite so unilateral or *ex parte* a fashion as the United States Attorney's letter of April 27, 1967 apparently assumes. Furthermore, if the Narcotics Agents have at last admitted to the United States Attorney that they perpetrated this automobile "bugging", should we not be allowed to question the Agents as to other possible electronic monitorings which have not only not been previously disclosed, but as to which there has been heretofore the most blithely unqualified assurance to the contrary? Earlier in this letter we quoted the colloquy from the pre-trial session of April

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27, 1966 in which Mr. Tendy turned to Narcotics Agent Fitzpatrick to obtain further confirmation that there had been no further electronic monitoring. Judge Palmieri, in that same colloquy, expressly asked Mr. Tendy whether he had questioned the Agents and read their reports. Intending no unfairness, we must here state that the result of the latter colloquy was to convey a secure confidence of mind to defense counsel (and to the Judge) that there really was not anything more for anyone to be concerned about in this case as regards other electronic monitoring. What could have been going through Agent Fitzpatrick's mind at that juncture? We do not know, and we surely do not at this point venture any invidious answer. But should we not have the opportunity to question Agent Fitzpatrick—and, with all respect, to question also Mr. Tendy as to what Agent Fitzpatrick represented to him then, and previously, and thereafter? Again we state, it is hard to believe that the Supreme Court (or, for that matter, the Solicitor General when or if this matter may come to his attention) will rest content with the United States Attorney's letter of April 27, 1967 which speaks so soothingly of the Nebbia automobile "bug" as having been non-productive—and which implies that further avenues of inquiry as to this item and as to other possible electronic monitorings in Georgia or elsewhere do not need to be judicially explored. How can anyone have confidence in these implicative assurances when the previous explicit and unqualified assurances proved to have been unjustified? The implications of the belated disclosure as to the Nebbia automobile "bug" in Georgia are not put to rest by its conclusorily alleged non-productiveness. This belated revelation of the Georgia automobile "bug" cries out for Schipani

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review in its utmost "*de novo*" and extended implications for the sake of the Fourth Amendment.

*Fourth*, the United States Attorney's letter of April 27, 1967 also reveals for the first time the trespassory electronic surveillance in 1962-1963 affecting the appellant Dioguardi. The letter states that "none of the conversations related in any manner to this case", and that the Narcotics Agents and the United States Attorney's aides who prosecuted this case were not among those to whom "the existence of the surveillance [or] any information overheard was communicated". In all earnest respectfulness, we must insist that this is not a satisfactory statement with reference to the "Schipani" and Fourth Amendment issues which we here urge. At the very least, we hereby expressly request that we be permitted to inspect the "logs reflecting the content of these conversations" which the United States Attorney states "are available and show that none of the conversation related in any manner to this case". In *Granello-Levine* the Solicitor General stated to the Supreme Court that, in the situation there presented (which was closely comparable to the situation of allegedly non-connected matters here claimed by the United States Attorney to exist), "petitioner's counsel will have a full opportunity to examine these logs, under an appropriate protective order, as a consequence of our action in the courts below respecting his other convictions. This, we believe, will confirm the proposition that there is nothing in them relevant to the instant case. If petitioner should be of any other view, he may, of course, seek a remedy in the district court" (*Granello-Levine*, U.S.S.Ct., Brief For The United States

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In Opposition, pp. 20-21). The United States Attorney's letter of April 27, 1967 does not tender to us any such opportunity to examine the logs of the Dioguardi Florida monitoring. We hereby respectfully request such opportunity as being an absolute prerequisite to any just constitutional decision of this case under the tests of the Fourth Amendment. Our interest in examining these Florida logs is not a matter of "standing on one's procedural rights" in a merely technical spirit, nor is our interest in evaluating the contents of those logs a merely academic one. The Government's *ipse dixit* that "none of the conversations related in any manner to this case" may or may not prove to be justified. Surely the independent efforts of defense counsel to discover pertinent significance in those logs cannot be concluded in advance to be futile merely on the Government's *ex parte* assertion; *a fortiori* independent judicial judgment on this question, reached after a proper adversary hearing, cannot be discounted in advance as futile. No one can say, without the benefit of such a hearing, that all or any of the following possibilities are predictably certain to be rejected by a Court after such a hearing:—That the Florida monitoring involved narcotics or leads to narcotics; that such narcotic leads or any other leads generated by the Florida monitoring may have proved useful to the Government for the present prosecution in one way or another; or that diligent defense questioning of the Agents or other persons in course of such a hearing would throw further doubt on the reliability of the assurances of the Government as to the extent and the methods of its overall electronic monitoring activities affecting this case.



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We therefore submit that, in the light (again) of the developments from *Black* to *Granello-Levine*, the very least to which we have now become entitled is a remand or some other appropriate order of this Court directing a reference of this entire matter for full judicial hearing to develop anew the facts of the three monitorings now admitted by the Government and of possible other monitoring as may be revealed through the probing procedures of such a *de novo* judicial hearing. We say this is the least to which we are now entitled; we of course adhere to our previous contentions in these appeals, now fortified, that the judgments should be reversed and the indictment dismissed.

. . . . .

All of the foregoing presentation in this letter has been prompted by the exchange of recent correspondence between Mr. Fusaro and the United States Attorney. We trust that the following additional remarks may appropriately be included in this letter as likewise pertaining, although less expressly, to that exchange of correspondence.

Mr. Fusaro's letter of April 18 did not ask the United States Attorney for any information about President Johnson's order of June 30, 1965 prohibiting or restricting electronic monitoring; and the United States Attorney's letter of April 27 did not touch upon that subject either. Nor, so far as we know, has the Government given the Court any additional information on that subject since the filing of the Government's supplemental memorandum after argument. In our own prior papers filed herein we have continued to ask that the Court direct the Government to supply

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additional information on this subject. We have also ourselves been trying to find out more about the contents of President Johnson's order. In our last previous motion papers herein (filed March 27, 1967) we informed the Court that in following up a newspaper report that Attorney General Clark had appeared before the McClellan Committee on the subject of the President's current legislative proposals *re* electronic monitoring, we had had a telephone conversation with a staff member of the Committee in which it had come about that the Committee might be interested in using written questions which we would prepare for the purpose of clarifying the contents of President Johnson's order, it being expected that the Attorney General would return before the Committee for further testimony. We did send the McClellan Committee the following list of questions:

"April 15, 1967

PROPOSED QUESTIONS TO BE ADDRESSED TO  
ATTORNEY GENERAL RAMSEY CLARK BY THE  
SENATE SUBCOMMITTEE ON CRIMINAL LAW  
AND PROCEDURE.

1. In the *Black* and *Schipani* cases in the Supreme Court, the Department has referred to a directive or order by President Johnson, on June 30, 1965, prohibiting electronic surveillance by the entire executive establishment except in national security cases. Can you tell us the exact contents of the President's order or directive?
2. Does the Department of Justice construe the President's order or directive as limited to telephone wiretapping and trespassory or physically pene-

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trational installation and use of concealed microphones or 'bugs', or does the President's order also cover any other kind of electronic surveillance?

3. Does the President's order cover 'parabolic mikes'? Detectaphones? Microphones placed at or near the edges of doors or windows of private premises? Minifons worn on the person?
4. Will you please furnish to this Subcommittee, for publication, or will the Department of Justice publicly release by any other media, an official written statement setting forth the exact words of the President's directive of June 30, 1965, along with a separate written statement of the Department's construction or interpretation of the President's words?"

On April 20, 1967 we received a letter from James C. Wood, Esq., Assistant Counsel of the McClellan Committee (Senate Judiciary Subcommittee on Criminal Laws and Procedures), stating in part as follows:

"Unfortunately, we did not have sufficient time to question the Attorney General about wiretapping, but we expect to have him continue his testimony at our next series of hearings in May. At that time we shall certainly use some of your questions."

The United States Attorney's office has been contending, evidently on the basis of no more actual knowledge than any of the rest of us possess, that President Johnson's order of June 30, 1965 applies only to outright trespassory "bugging" (and, it would seem, telephone wiretapping).

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In support of these contentions the Government has referred, in various of its papers herein, to the fact that the Solicitor General opposed certiorari in the *Pardo-Bolland* case, and to cases of non-trespassory monitoring of the "minifon" type involved in the *Osborn* case or of the concealed listening device type in a Government agent's own room as involved in *Jakob v. United States*, October term 1966, no. 766 and no. 973 Misc. (decided by this Court *sub nom. United States v. Edwards*, 366 F. 2d 853 (C.A. 2, 1966)). What the Government has not pointed out, however, in referring to *Pardo-Bolland*, *Osborn* and *Jakob (Edwards)* is that the monitoring in all of those cases long pre-dated the President's order of June 30, 1965.

It is also significant to trace out the extremely interesting verbal-formulary evolution of the Solicitor General's own interpretation of the President's order in the papers filed by the Solicitor General in *Black*, *Schipani*, *O'Brien-Parisi* and *Granello-Levine*. In *Black* and *Schipani* the Solicitor General's references employed wordings which, we admit, are susceptible of meaning that the President's order was being treated in those cases as applying to forms of monitoring clearly outlawed by prior decisions of the Supreme Court. But in *O'Brien-Parisi* the Solicitor General used quite different words in apparent reference to the President's order as deemed applicable under the then recently announced *Schipani*-review policy. Thus, at pp. 10-12 of the Brief For The United States in *O'Brien-Parisi*, the Solicitor General stated that "Pursuant to" the *Schipani*-review policy "we have conducted a review to determine whether any electronic eavesdropping or wiretapping affected the convictions of either of the petitioners. It

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appears from this inquiry that neither petitioner was the direct subject of electronic surveillance and that no such surveillance was conducted on the residence or business premises of either petitioner". Could there be a clearer indication that the Solicitor General has decided to administer the *Schipani*-review procedure in the most comprehensive manner with a view to determining whether "any electronic eavesdropping" was involved? Note, in the item just quoted, the apparently deliberate separate inclusion of a duty of disclosure as to both "electronic surveillance" without further qualification, and as to "such surveillance \* \* \* on the residence or business premises of either petitioner".

Similarly in *Granello-Levine* the Solicitor General told the Supreme Court that "Pursuant to" the *Schipani* policy "we have conducted a review to determine whether any electronic eavesdropping or wiretapping affected the conviction of either of the petitioners. It appears from this inquiry that no conversations of petitioner Granello were overheard by any electronic surveillance; he was never the direct subject of an electronic surveillance nor did he engage in conversations held on other premises which were subject to such surveillance" (October Term 1966, no. 750, Brief For The United States In Opposition, p. 16).

We submit that the above described indications of the Solicitor General's broadly inclusive interpretation of the President's order as applied to *Schipani*-review situations, and the failure thus far of the Government in this case to furnish a statement of the actual contents of the President's order, make it appropriate for us to renew our



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prior request that such information be furnished by the Government.

Respectfully submitted,

/s/ ABRAHAM GLASSER  
Abraham Glasser  
*Of Counsel for Appellants*

cc: Hon. Robert M. Morgenthau  
United States Attorney  
Fred A. Jones, Jr., Esq.  
David M. Markowitz, Esq.  
Arnold C. Stream, Esq.  
Irving Younger, Esq.

APPENDIX D\*

**Appellants' Brief in Court of Appeals After Remand  
Re Electronic Eavesdrop Issues**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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Docket No. 30849

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

—against—

SAMUEL DESIST, FRANK DIOGUARDIA, JEAN CLAUDE LEFRANC,  
JEAN NEBBIA and ANTHONY SUTERA,

*Defendants-Appellants.*

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**BRIEF FOR APPELLANTS AFTER REMAND  
HEARING RE ELECTRONIC SURVEILLANCE**

This brief is respectfully submitted on behalf of the appellants, by permission of the Court, following the opinion and report of Hon. Edmund L. Palmieri, D.J., relating to the recent hearing before Judge Palmieri on electronic surveillance pursuant to remand orders of this Court.

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\* At pp. A 69 et seq., *infra*, reference is made to Defendant's Exhibit A, a tentative list of proposed defense witnesses in the remand hearing in the District Court. At pp. A 73 et seq., *infra*, reference is made to Defendant's Exhibit B, a statement of relevancy of proposed defense proof in that remand hearing. These two documents are printed as Appendix E hereto, pp. A 97 et seq., *infra*.

*Appendix D—Appellants' Brief Re Electronic Eavesdrop***PRELIMINARY STATEMENT**

We shall not here repeat the extensive details of our previous briefs and other papers which seem to us to impugn the truthfulness of the Narcotics Bureau witnesses as to the methods used in carrying out the Waldorf Astoria eavesdropping on which the narcotics conspiracy convictions of these appellants were so largely based. Nor shall we here repeat the likewise extensive details of the Government's long-continued reluctance to meet properly its obligations under the "Schipani" procedure, a reluctance which had to be dealt with by successive directives from this Court. However, without now re-threshing the details of these distressing prior matters, we must continue our efforts to keep these matters in the forefront. The Government's conduct in question which preceded the recent remand hearing before Judge Palmieri should not be permitted to fade from this case as being merely some sort of "background" that has lost importance in the overall constitutional evaluation of the electronic search issues.

On the contrary, the recent hearing before Judge Palmieri, as we shall show, has brought to a new climax the puzzling behavior of the Government in regard to its constitutional obligation of disclosure of its electronic search activities in this case.

Regrettably also it appears to us—with all earnest respectfulness—that the District Court in the recent remand hearing misconceived its own constitutional obligations; for as we shall show, the District Court failed to enforce upon the Government an appropriate compliance with the

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duties of disclosure which this Court formulated in its order of remand.

In offering the above broadly stated introductory contentions, we are only too keenly aware that the opinion and report of the District Court reads 'powerfully indeed. Its power, however, is only on the surface, as we think this brief will demonstrate.

The primary issue is whether the recent District Court hearing (and adjudication) complies with this Court's mandate for a "full hearing"—or whether instead unworthy procedural technicalities, unworthy procedural tactics of the Government, and ill-advised procedural rulings by the District Court have availed to thwart the constitutional purposes which motivated this Court's orders of remand. Putting it in another way, the issue is whether, considering the record as a whole (including the prior conduct of the Government), there has now emerged a judicially palatable (by constitutional standards) record and adjudication absolving the Government and finally precluding the defendants-appellants in the electronic search matters to which this Court's orders of remand were addressed.

SUMMARY OF THE PROCEEDINGS AND TESTIMONY  
IN THE DISTRICT COURT HEARING

(Together with this brief we are filing copies of our typewritten "Brief For Defendants-Appellants After Remand Hearings Re Electronic Surveillance, With Requests For Findings" which we submitted to Judge Palmieri. Since that document contains detailed references to the hearing record, we shall occasionally refer to it in this brief, for the sake of brevity.)

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The hearing before Judge Palmieri was based upon two orders of this Court, the first of which referred to a communication of April 27, 1967 from the United States Attorney. The first order of this Court, dated May 29, 1967, provided as follows:

“Upon consideration of the letter of April 27, 1967, to the Clerk from the United States Attorney, and the letter of May 1, 1967, to the Clerk from counsel to appellants.

IT IS HEREBY ORDERED that the case be remanded to the district court so that the trial judge may conduct a prompt and full hearing to ascertain the Government's use of electronic equipment on the occasions referred to on page 2 of the above-mentioned letter from the United States Attorney, the effect, if any, of such use on the trial and conviction of appellants or any of them, and whether or not a new trial should be granted. At such hearing the district court will confine the evidence presented by both sides to that which is material to questions of the content of any electronically eavesdropped conversations overheard on those occasions, and of the relevance of any such conversations to petitioners' subsequent convictions;

IT IS FURTHER ORDERED that the district court judge make such findings of fact and conclusions of law, as may be appropriate in light of the further evidence and of the entire existing record, and report to this court, which retains jurisdiction of the appeal;

IT IS FURTHER ORDERED that such report and any other matters in connection with this appeal be referred to the panel that heard argument of this case on January 19, 1967.”



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The portion of the letter of April 27, 1967 from the United States Attorney referred to in the above order read as follows:

"a) On December 18, 1965, in Columbus, Georgia, agents of the Bureau of Narcotics installed an electronic listening device in an automobile prior to its rental by Jean Nabbia. The device did not work and no conversations were overheard or recorded. This office was not aware of the installation of this device at the time of the trial below.

b) Between April 25, 1962 and April 1, 1963 agents of the Federal Bureau of Investigation installed, by trespass, an electronic listening device in the business establishment in Miami, Florida of an individual having no connection with the instant case. In 1962, two and a half years before the inception of the conspiracy, defendant Frank Dioguardi was overheard as a participant in two conversations at said establishment. Logs reflecting the content of these conversations are available and show that none of these conversations related in any manner to this case. Neither the existence of the surveillance nor any information overheard was communicated to the Bureau of Narcotics or to Government counsel who prosecuted the case."

The second order of this Court, dated June 14, 1967, referring to a motion of the defendants-appellants (*infra*), provided as follows:

"Referring to the prayer for relief contained on page 10 of the within motion, it is ordered that No. (1) be granted to the extent of allowing appellants to explore, in addition to the incidents described in the letter of April 27, 1967 to the Clerk from the

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United States Attorney, the question of whether any governmental personnel engaged in any other electronic eavesdropping of any other kind which related to this case, except that prayer for relief No. (2) is denied and the motion is in all other respects denied."

The motion of the defendants-appellants referred to in the order last quoted contained the following prayers:

" \* \* \* (1) that at the hearing on remand before the District Court the appellants be permitted to explore the question of whether any Government personnel engaged in any other electronic eavesdropping of any other kind which related or might relate to this case, i.e., any such other electronic eavesdropping in addition to those instances referred to in United States Attorney Morgenthau's letter of April 27, 1967; (2) that at said hearing on remand before the District Court the appellants be permitted to explore the question of whether the electronic eavesdropping litigated at the trial of this case was effected in the manner claimed by the Government. We also now respectfully renew all of the motions and requests previously made to this Court during the pendency of the within appeals, with respect to the issue of electronic eavesdropping."

It should be noted here that the latter motion of the defendants-appellants had cited *Hoffa v. United States*, U.S. , 18 L.Ed. 2d 738, in support of the prayer for an enlargement of the scope of the remand hearing to include any other electronic eavesdropping of any other kind which related or might relate to this case; and it has been assumed by both sides herein that this Court's above quoted order of June 14, 1967 reflected the standards laid down in

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the *Hoffa* case, *supra*. As will appear, an issue arose before Judge Palmieri as to the scope of this Court's order of June 14, 1967, and Judge Palmieri resolved the issue in favor of the Government, giving rise to one of our claims of procedural error (*infra*).

In turning now to our description of the proceedings before Judge Palmieri, we note preliminarily that, for convenience in evaluating the constitutional fairness of the proceedings below as that issue evolved on the record, it seems desirable to describe the proceedings in a chronological manner; this chronological method will not hamper, we believe, the presentation of the hearing testimony in a meaningful way. Also, for convenience in citing the pages of the stenographic minutes of the several hearing days, we shall indicate each hearing date by a heading at the margin, thereafter citing only page numbers for each such date, without repeating the hearing date each time for each page number, except as the context may require otherwise. It will be recalled also that, for brevity, we shall be referring occasionally to the typewritten brief filed by us before Judge Palmieri, extra copies of which are submitted herewith as previously stated.

*June 7, 1967:*

See the brief which we filed before Judge Palmieri, at p. 3 (hereinafter the latter brief will be cited as "DB").

At the outset of the first hearing day (June 7, 1967), the District Court, referring to the Government's duty in this hearing said, "There should not be any secrets about this proof. Whatever the proof is, the Government is under a very clear obligation to set it forth, place it before the

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Court, make it available to counsel'' (S.M. 3). Unfortunately, the District Court did not adhere to this initial wise procedural insight (details *infra*).

Also, on June 7, defense counsel asked that the Florida tape recordings be produced and that the pertinent eavesdrop devices be produced or reconstituted, and the District Court agreed; the Government announced that no tapes existed, and it objected to producing or reconstituting the electronic devices, but the Court continued to agree with defense counsel as to the latter (S.M. 13-22). Unfortunately, again, the Court did not later adhere to its initial wise view on this vital matter (details *infra*).

Since Judge Palmieri's opinion and report herein deals so prominently with the theme that the defendants-appellants were afforded ample opportunity to litigate their constitutional rights in the recent District Court hearing, it becomes important to scrutinize the record closely on that subject, and we shall present the pertinent record items in this brief. The first of those items appears in the proceedings at the June 7 session before Judge Palmieri, where defense counsel portrayed in detail their need for reasonable time to prepare; indeed at that juncture—which was only a few days after this Court's first remand order, arrangements had not been made for retention of defense counsel for the purposes of the remand proceedings (S.M. 23-43).

*June 14, 1967*

See DB 3-4.

At this second day of the proceedings below (June 14, 1967) the District Court announced the amended order of

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this Court which had been made that same day, enlarging the scope of the remand hearing to include any and all other eavesdropping which may have affected this case (S.M. 1-4). In the light of the amended order, defense counsel emphasized with renewed urgency that adequate opportunity for defense preparation, including an effective independent defense investigation, was indispensable\*; it was at this juncture that the District Court first began to manifest a sense of inconvenience or impatience in the face of the indicatedly enlarged hearing task—we intend no disrespect in making this latter observation, but we do feel obliged to do all that we properly can in order to commend our clients' situation to sympathetic constitutional understanding by the reviewing Tribunals as regards the incipient "folklore" imputation in this record that we are being some sort of ingrates or litigious "pests" because we are protesting lack of fair due-process procedural hearing opportunity; the above suggested concern of the District Court which first manifested itself at the June 14 session took the specific form of an indication by the Court that it might wish the Government to proceed with its own case before completion of the defense investigation, whereupon defense counsel—instantly sensing that defense cross-examination of Government witnesses on the Government's direct case might well be handicapped by such a procedure—requested, and received assurance from the Court, that our opportunity in terms of a "second round" (for effective

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\* Arrangements for retention of defense counsel had not yet been effected, incidentally, as some of the defendants had to be brought to New York from other places of imprisonment.



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opportunity for cross-examination) would be kept in consideration (S.M. 6-11, 14-19, 21-23).

*June 19, 1967:*

See DB 4-5.

At the June 19 hearing we were in a position to advise the Court for the first time that the defendants had been able to complete their arrangements for employment of counsel; defense counsel also again urged the difficulty and unfairness of being obliged to proceed with the evidentiary phases of the remand hearing—i.e., of being obliged to proceed *via* presentation of the Government's case when the defense was not ready for effective cross-examination because our own investigation needed to be done first (S.M.1-7).\*

Also at the June 19 session the Government urged the Court to recede from its previous position that the electronic devices should be produced or reconstituted, the Court reserving decision (S.M. 12-15).

Also at the June 19 session defense counsel announced names of witnesses (several Federal Narcotics Agents)

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\* Several times in the remand hearing below we were obliged to make the embarrassing disclosure that our efforts for an effective independent defense investigation were hampered by the severe financial circumstances of our clients, whose respective personal circumstances have undergone the familiar financial attritions of projected long-term incarceration doom. The position of the Government—supported, unfortunately, by the Court below—in refusing to discharge its constitutional obligation of making a plenary presentation of the relevant electronic-search facts, combined with the financial hardships of the defendants, has resulted in a mocking of constitutional due-process procedure in what we had thought would be an authentic "Schipani-type" hearing in this case.

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whom we would want in light of the amended order of this Court and of the fact that this was not an "adversary proceeding" in the ordinary sense but was a proceeding in which the Government had a constitutional obligation of unstinting disclosure; defense counsel also noted that additional names of witnesses would be forthcoming; the Court reserved these matters until after the Government should proceed with its *prima facie* case, and the Court added, "Let's wait and see what the Government offers. Cross-examine to the best of your ability at that time and at that point we can then make some sounding to determine what the future course of the hearing should be" (S.M.25-28, 32).

*June 26, 1997:*

See DB 5-8.

On the above date the Government proceeded with its *prima facie* case; defense counsel first again noting objections to the Government's narrow formulation of the scope of its obligations under this Court's orders of remand, i.e., the Government's proposal that it not be required to submit any proof as to the technological method of the electronic devices used; the District Court reserved its rulings on these objections (S.M.22, 207).

Before the Government proceeded with its *prima facie* case on June 26, we also objected to being deprived of access to the entirety of the F.B.I. logs of the Florida eavesdropping; the Court sustained the Government in its refusal to show us anything except selected portions of the logs in which conversations involving the defendant-appellant Frank Dioguardi were overheard (S.M. 13-21).

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The Government's *prima facie* case as to the Florida eavesdropping consisted of the introduction in evidence of the excerpted portion of the logs above mentioned, plus submission for the Court's own examination (and for sealing for appellate examination) of the Florida logs for the entire year or so (1962-1963) mentioned in Mr. Morgenthau's letter of April 27, 1967, and of testimony by three F.B.I. monitoring clerks from the Miami office who had monitored the portions of the eavesdrops for which excerpted logs were shown to us and who had prepared those portions of the logs (DB 5-8). From the excerpted portions of the logs shown to us (Government's Exhibit for identification 103) it is said that the Government "proved" that nothing which was overheard in the Florida trespassory electronic eavesdrop concerning defendant-appellant Dioguardi related to this case, and that no other defendant in this case was overheard in that eavesdropping; and the District Court announced that it had examined the entire logs (Government's Exhibits for identification 100 and 102) and had found nothing further therein affecting any defendant in this case (S.M. 20—June 26, 1967). For reasons which may be more meaningfully considered after we note the testimony of the three F.B.I. Miami monitoring clerks, we contend that it was a denial of fair hearing to restrict our access to the logs in the manner just described.

As to the testimony of the F.B.I. Miami clerks, our recitals in this brief may be kept short (see, again DB 5-7). All three of these clerks testified, in essence, that they monitored a device (description of which was prevented by the Court's rulings (e.g., S.M. 33-39)) in the Miami F.B.I. office

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which was picking up conversations from a bar in Miami called the Casa Maria or Dorey's; that the within defendant-appellant Dioguardi was at times overheard in those conversations; that the clerks at times would make handwritten notes of what they heard and when something relevant or important seemed underway they would play the tape recording and make a transcript (or log) thereof, sometimes using the tapes and the written notes in aid of each other; the tape recordings and the monitoring device not having functioned perfectly at all times; that as soon as the written notes had served their purpose in making up the logs the notes were destroyed; and that the tapes were invariably erased at the end of seven days after each tape was made, in accordance with a regular procedure in the Miami F.B.I. office.

Of special interest was the further testimony of all three clerks—on cross-examination—that at times the Casa Maria-Dorey's eavesdropping was conducted during a shift from midnight to eight A.M. (S.M. 54-56, 70-73, 165, 177). This latter is of special interest; we say, because the Government did not produce any witness who participated in such post-midnight eavesdropping;\* we do not know whether the complete logs (Exhibits 101, 103), which we were never permitted to see, include any post-midnight eavesdropping. It seems extremely strange that there should be no logs (if such in truth be the case) for this year-

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\* It is the recollection of defense counsel that none of the logs shown to us (Exhibit 101) covered any post-midnight items. We have not seen the Exhibit in question since the hearings below; we shall re-check the Exhibit and if necessary we shall advise the Court further by letter in the immediate future.

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long F.B.I. "bugging" of a place like the Casa Maria-Dorey's drinking establishment in which nothing overheard after midnight was deemed worth preserving. The entire log we have never seen, as said, but we saw in open Court as it was being handled by the Government and the Court that it is an item apparently weighing some pounds and apparently containing many hundreds of pages. Where, then, are the post-midnight materials in this massive year-long "bugging" of this Miami night spot? Is it to be simply *assumed* that the Government eavesdropped no conversations at all by Frank Dioguardi after midnight during the entire year in question when he was evidently a habitué of that place?

The disturbing questions which we have just suggested become the more disturbing when it is recalled that the F.B.I. allegedly had a regular seven-day erasure procedure in which, allegedly, all of the original tapes of the Casa Maria-Dorey's eavesdropping were destroyed. See further as to this erasure procedure, *infra*.\*

As indicated in the immediately preceding footnote, the foregoing concluded—or would have concluded but for developments to be described shortly—the Government's entire case in supposed discharge of its burden of disclosure as to the Florida eavesdrops; that is, the Government evi-

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\* We are deferring our further description of the testimony on this tape-erasure subject in the proceedings below because the foregoing was as far as the Government cared to carry its presentation on this subject as part of its own case in this hearing; it will be recalled that we are deliberately presenting our within summary of the proceedings below in a chronological manner so that this Court may see just how the procedural injustices in this hearing evolved.



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dently deemed—until it was almost literally forced to a different view by the District Court (*infra*)—that nothing more was needed to dispose of the Florida eavesdropping problem in the Government's favor than to "show" that the tapes had been destroyed by three subordinate employees of the F.B.I. and to *assert* that the logs produced in Court tell the whole story.\*

Resuming our summary of the proceedings of June 26, 1967:—After the above testimony by the Florida F.B.I. clerks, the Government took up the Columbus, Georgia, Avis Car-Rental eavesdrop of December 18, 1965, the second of the two new items revealed in Mr. Morgenthau's letter of April 27, 1967. Narcotics agent Jacques I. Kiere testified for the Government on this subject (S.M. 176 *et seq.*). Agent Kiere said that the Georgia car bugging surveillance started shortly after noon on December 18, 1965, and it continued until shortly after midnight of that day, when it was terminated on the road between Columbus and Atlanta (S.M. 178-180). Occasionally Kiere left the Government vehicle (S.M. 179). Automobile surveillance was resumed on the morning of December 19, but without a listening device (S.M. 180-181). The device of the preceding day did not work (S.M. 179-180). Kiere never made any notes or reports about the use of electronic equipment (S.M. 210).

With the above beautifully simple testimony of Agent Kiere on June 26, the Government evidently thought it had

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\* As will be seen, the supplemental testimony which the Government later adduced concerning the Florida eavesdropping, under practical compulsion by the District Court, failed nevertheless to dispose of the troublesome questions which we have above suggested.

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the entire remand hearing so "wrapped up", on both the Florida and Georgia items, that it took a step which may justly be characterized, as procedurally astounding, and which we submit reveals more starkly than perhaps any other incident in this entire picture how far the Government has been and is from appreciating its constitutional duties in the present matter. It will be recalled that throughout the within hearings in the Court below we had been pleading with Judge Palmieri not to force the hearing forward on an evidentiary basis until we were ready with the results of our independent investigation, lest otherwise we be unfairly hampered in cross-examining on the Government's *prima facie* case. As of June 26, 1967, the hearing session which we are now discussing (and in which our above summary had reached the point of the termination of Agent Kiere's simplistic direct testimony), we had just been able to commence our investigation a few days before, as we had advised the Court (S.M. June 19, 1967, p. 8); we had also advised the Court of the financial difficulties which our clients were having in providing us with an investigative budget (*supra*). It was thus perfectly well understood by the Government that we surely were not going to be ready for *investigatively prepared* cross-examination of *all* Government witnesses at the proceedings on the Government's *prima facie* case on June 26, 1967. We did, however—out of perhaps excess of complaisance under the time pressures which the Court stated it felt—assure the Court that we would make every good faith endeavor to cross-examine Government witnesses without awaiting the completion of our own investigation (e.g.; S.M. June 26, 1967, pp. 28-29).

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And we did cross-examine the three Miami F.B.I. clerks (*supra*).<sup>\*</sup> But, as suggested in the last preceding footnote—and for the reasons there explained—the last thing that we, as defense counsel, were prepared or willing to do on June 26 was to set foot into a premature cross-examination of the Government's evidently-intended prime witness (Agent Kiere) on the all-important subject of the Georgia car bugging. We therefore announced that we were invoking our previously reserved right to defer cross-examination of Agent Kiere at that juncture (S.M. June 26, 1967, p. 181).

The next ensuing happenings are important as demonstrating how the defendants became procedurally hog-tied

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\* We trust that in the framework of this constitutionally-based "Schipani-type" judicial inquiry we may mention the following off-the-record facts, as being a representation by counsel as members of the Bar of this Court:— So stringent were our budgetary limitations for our investigation herein that, after prolonged conference among all defense counsel and all defendants, it was reluctantly decided that we could afford the expense of investigation as to only the situation of the Georgia car bugging. Naturally we could not disclose this in the proceedings below, as it would have been unfair to our clients to apprise the Government of this unavoidable weakness in our investigative front. Accordingly, we cross-examined the F.B.I. Florida witnesses on June 26, 1967, for the simple reason that, having been unable to undertake the expense of any investigation of the Florida situation, there was no reason to defer that particular cross-examination. Quite otherwise was our strategic posture, as defense counsel, in regard to the cross-examination of Agent Kiere (concerning the Georgia car "bug") on June 26, for as to that phase of the case we had committed, for good or ill, our entire meager investigative budget and we did not yet have our investigative results. The Government has taunted us in the proceedings below, and we doubt not that it will do so again in its forthcoming presentation before this Court, for our alleged failure to develop more concrete investigative results in sectors of the case other than the Georgia situation. At the appropriate place in this brief *infra*, where we shall be taking up the record facts as to our own proofs and offers of proof in the Court below, we shall speak further of this question of the hopes and the disappointments of our recent investigation.

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in this hearing through the District Court's toleration of the Government's obstructive tactics; the record relating to these next developments (at the June 26 session) needs to be noted in some detail:

In response to our above noted announcement of June 26 that we were invoking, with respect to Agent Kiere, our previously reserved right to defer cross-examination until our own investigative preparations were completed, the Court stated (S.M. 181), "All right. We will see. We will just go on with the Government's proof and then we will reoffer the witness [Kiere] for cross-examination."

Government counsel then insisted that our position caused inconvenience to the Government by reason of Kiere's travel status, the Government having brought him from Europe; and that we should be required to proceed (S.M.181-182). There followed a short colloquy between the Court and defense counsel in which we agreed to proceed with the cross-examination of Kiere for the limited purpose of laying a foundation for later resumed questioning as to whether he knew of any other electronic eavesdropping in this case, and in response to those foundation questions Kiere answered in the negative (S.M.182-183). What we were reserving for further cross-examination of Kiere was, of course, the crucial matter of his credibility in the light of what we were at that time beginning to expect our investigation to produce (S.M. 184). Nevertheless, as just seen, we submitted to the Government's and the Court's desire that we at least commence a cross-examination of Kiere. And when we concluded our short cross-examination (*supra*), we immediately informed the Court that "we are going, we hope, to be prepared, your Honor,

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to re-address ourselves to this subject within a reasonable time, and at that time it may be necessary to call Mr. Kiere back" (S.M.183).

We then expressly formulated to the Court our above noted expectation that we wanted also a further opportunity, upon completion of our investigation, to probe Kiere's credibility concerning the Georgia incident (S.M.184).

This last apparently in some way disturbed the Court, for it seems to have produced a sudden re-orientation of the Court's attitude concerning what we thought had been a pretty safe assurance to us that we would have adequate cross-examination rights after completion of our investigation, that is, that we would have (as we previously phrased it) a "second round" with respect to the Government's direct case (which the Court had wanted put in without waiting for completion of our investigation). The re-orientation of the Court's attitude just referred to appeared at S.M.184 (June 26, 1967) when, in responding to our above noted statement that we intended to probe Kiere's credibility as soon as we were adequately prepared to do so, the Court said, "I will have then to defer judgment pending an offer of proof by you"; the Court went on to explain that since Kiere had said nothing was audible on the Georgia car bug, there was no basis for cross-examination on the then record, wherefore we would have to justify bringing Agent Kiere back when and if we should be in a position to "make an offer of proof which would require his presence" (S.M.184-185). We then pointed out that "We asked your Honor with all due respect not to press us to try this and present this hearing until we were ready with our cross-



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examination. Now to tell us we can't cross-examine him unless we make an offer of proof at the right time is to prejudice us \* \* \*. Even though I don't do it until next week or I don't have any evidence, then I still want to cross-examine this man. There are many things that I want to interrogate him on, but I don't want to do it now when I am not prepared." (S.M.185).

Colloquy then continued in which the Government pressed that we should be required to continue the cross-examination of Kiere; we again pointed out the handicaps under which we were operating (as noted *supra*, our investigation had commenced barely a week previously); the Court apparently began to orient back towards a more receptive attitude in favor of our position but still placing us under obligation to make an offer of proof and still declining to assure us that we could later cross-examine Kiere again; Government counsel again pressed that Agent Kiere should be finally excused and protested that "I don't think that this burden should be imposed upon us," to which the Court replied "I see no way to escape it, Mr. Tandy"; defense counsel again urged that we had proceeded diligently and that the impasse was not of our making because we had urged from the outset that the evidentiary phases of the hearing should await completion of our investigation; Government counsel then saw fit to impugn our good faith, accusing us of "unconscionable conduct"; thereupon the Court excused Agent Kiere, and defended us against the charge of bad faith; the Court then went on to say that the Government should proceed with its case and called upon the Government to produce its next witness (S.M.185-191).

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This latter direction of the Court to the Government that it should continue with its direct case without requiring us at that juncture to undertake full cross-examination was the immediate precursor to a climactic happening in this hearing. Right after this direction by the Court there was a short colloquy of three sentences between the Court and defense counsel about 3500 material of Agent Kiere, and before this 3500 discussion was brought to a result, Government counsel exclaimed, "Your Honor, the Government rests".(S.M.191).

We have no hesitation in stating that we (defense counsel) were thunderstruck by this announcement. Indeed, we were at first unable to accept that the Government meant the announcement in a literal and final sense, and we even asked Government counsel, in earnest colloquy, restating our question several times, whether their action in thus suddenly resting the Government's case represented a really final commitment on its part, to which Government counsel replied, "You take it any way you want" (S.M. 191-192). Even after this response, we continued to urge upon Government counsel that they should bethink themselves; we said, "If it is so intended [as a final resting by the Government], it should be so stated on the record so we can procedurally avail ourselves of this surprising development. But if this is not so, we don't want to take any undue advantage of it" (S.M. 192).

The Court then asked Government counsel to reconsider their action, adding "I believe you have other witnesses who are prepared to testify, and once you make a clean breast of this entire situation and all the evidence which

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you have at your command, that is the time I thought you were going to rest" (S.M. 192). Government counsel's reply to this request from the Court was that "This possible tactical approach, regardless of what happens here this afternoon, is something that [we] \* \* \* anticipated a long time ago. \* \* \* This is not the result of impetuosity on the part of the Government" (S.M. 192-193).

After some further desultory colloquy among counsel and the Court (S.M. 193-195), the Court asked Government counsel whether they had called all of the Government personnel who actually monitored and transcribed the Dioguardi portions of the Florida eavesdrop, and the Government replied in the affirmative (S.M. 195-196). Evidently, in making this inquiry of Government counsel, the Court was undertaking to assess whether in some formal or technical sense the Government had put in enough of a *prima facie* case as to the Florida situation so that the Court might not be under the necessity of compelling the Government to proceed further—we may take it also that as to the Georgia situation the Court conceived the Government's "*prima facie*" position as consisting, in the formal or technical sense just suggested, of the flatly negative testimony of Agent Kiere.

In any event, upon receiving the Government's assurance as aforesaid concerning completion of its proofs as to Florida, the Court announced that it was "surprised and somewhat disconcerted by the turn of events. However, I am not in position to tell the Government how to proceed, and the Government has to proceed on its own responsibility. They realize the seriousness of this responsibility as much as I do. I would be confronted with the necessity of

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making my findings and conclusions on the basis of the record that is made before me"—immediately after which the Court also stated that the defendants were entitled to a fair opportunity to submit their own proof, and "I don't think they have had an adequate opportunity to prepare or to complete whatever investigation they wanted to make" (S.M. 196-197).

Shortly after this, apparently sensing the possibility of further pressure in view of some expression of uncertainty by the Court (S.M. June 26, 1967, pp. 197-203), Government counsel hammered at the Court again to preclude us from cross-examining further Agent Kiere, and when the Court refused to do this, Government counsel shifted to the tack that Agent Kiere should be sent back to Europe and if later again needed should be brought back at the expense of the defendants (S.M. 204-206). The relentless pressure by the Government now at last produced the desired effect, as the Court replied to this last-described tack, "They [the defendants] are taking their position [in] the full responsibility of the fact that they may not be able to persuade me that he should be called back and they may not themselves be able to get him back. They are taking the risk inherent in this situation, as well as your taking the same risks" (S.M. 206). Defense counsel immediately expressed alarm and protest over this latter statement of the Court, it being again pointed out that all of this could have been avoided if the proceedings had not been rushed without awaiting completion of our investigation; the Court now replied, "They gave you their *prima facie* case" (S.M. 206). And the session of June 26 concluded on the note that the Court, with respect to our right to have Agent Kiere recalled, was

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"taking no position \* \* \* and I am reserving my judgment completely" (S.M. 211).

*July 6, 1967:\**

See DB 8-9.

At an attorney's conference on the above date we apprised the Court that we unexpectedly and unavoidably needed additional time to complete our investigation, and we submitted a tentative list of witnesses (S.M. 1-6; Defendants' Exhibit A for Identification). The Government not only opposed granting us the time requested for completion of the investigation, but it insisted that, having rested its case on June 26, it had "no obligation whatsoever" to "produce anybody", and the Government's chief counsel said, "I don't think it would be fair to even suggest that we might even consider doing this in the spirit of cooperation. The Government has extended itself beyond all possible hope of fairness here" (S.M. 8-12, especially at 10).

Our above mentioned list of witnesses included numerous narcotic agents and other government officials, some of high echelon status, including high Army officers (Defendants' Exhibit A, *supra*). It was plain that this list of witnesses was not pleasing either to the Government or to the District Court (S.M. 8-12, 15, 17-25). As the Court indicated its strong disinclination to allow us to call witnesses at all unless justified by an offer of proof, we assured the Court that at the next scheduled hearing session (July 11) we would submit a statement of relevancy or an offer of proof

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\* The minutes of July 6 are incorrectly dated July 7, 1967.



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in support of our request for the witnesses listed in our Exhibit A\* (S.M. 17-25). Thus, in this last-described development of July 6 we found ourselves forced into the position not only of needing an offer of proof before we would be able to continue the vitally needed cross-examination of Agent Kiere, but now also of needing an offer of proof even in order to be allowed to call any substantial number of witnesses on our own case.

Our above mentioned Exhibit A list of witnesses included Mr. Tendy and Narcotic Agent Fitzgerald. These two persons the Government agreed to produce for us, both of them being stationed in New York City, and the Court directed that they be heard on July 11 (S.M. 11-12).

However, at this attorneys' conference of July 6 we saw our whole procedural position deteriorating, as the Court (evidently displeased by our Exhibit A list of witnesses) finally took the position, without even awaiting the offer of proof which we had been told might assist us, that there was not going to be any full exploratory hearing in this case, notwithstanding the Government's having slammed the door by resting its "case" on June 26 (S.M., July 6, 1967, pp. 18, 20-21).

Also at the July 6 conference the Court suggested that the Government produce the F.B.I. official in charge of the Miami office, and the Government agreed to this suggestion (S.M. 18-26).

*July 11, 1967:*

See DB 9-12.

Pending completion of our independent investigation—for which the Court had allowed us until July 18, 1967—we

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called as witnesses on July 11 Mr. Tendy and Agent Fitzgerald, and the Government called Miami F.B.I. Supervisor J. Wayne Swinney in compliance with the Court's direction.

Mr. Tendy's testimony (S.M. 8-40) yielded, we may say, no information relevant to the within electronic surveillance issues, except that Mr. Tendy possessed practically no information on the subject. He had no information as to whether the narcotic agents' original visit to the Waldorf Astoria on December 14, 1965 was the result of information obtained through electronic eavesdropping, nor did he know who in the office of the United States Attorney or the Bureau of Narcotics might have such information (S.M. 11-12). Objections were sustained to a defense question as to what had been the conversation between Mr. Tendy and Agent Fitzgerald in the pre-trial hearing on April 27, 1966, which had resulted in Mr. Tendy's assuring the Court that there had been no electronic surveillance except the Waldorf-Astoria incident (S.M. 22-24). Mr. Tendy knew nothing about the "Schipani" review procedure in this case (S.M. 22), and objections were sustained to various questions as to intramural aspects of such "Schipani" procedure in this case (S.M. 24-30, 33-34). Objections were also sustained to questions as to whether Mr. Tendy had conferred with Agent Kiere about the Georgia car bug (S.M. 37-40). As we urge in our argument *infra*, it is difficult to understand how the Government and the Court below can justify the situation depicted in this practically futile examination of Mr. Tendy, i.e., the apparent veiling of the seemingly indispensable *ultimate* facts of the "Schipani" inquiry in this case, the ultimate facts which could

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come only from a plenary exploration of the entirety of the acts and records of all Government agents or agencies which have been involved in this case.

Agent Fitzgerald testified (July 11, 1967) that he had entered the case early in 1966, subsequent to the arrests (S.M. 43-44). Objection was sustained to a defense question asking under whose supervision he conducted his operations (S.M. 43-44). Fitzgerald testified that he first learned of the Florida and Georgia eavesdropping incidents in April 1967 (S.M. 46); and objection was sustained as to the source of this incongruously belated knowledge on his part (S.M. 46); objection was also sustained to a question asking the source of Fitzgerald's knowledge that there were no tapes or transcripts of the Georgia car bugging (S.M. 48). Fitzgerald's remarkable certitudes extended even to unqualified assertion of knowledge that no Narcotic Agents in this case had possession of any electronic equipment other than in the three admitted instances (S.M. 49-51). Objection was sustained to a question as to whether there was any electronic activity in this case subsequent to the date of indictment (S.M. 52-53). And objection was sustained to a question seeking to elicit Fitzgerald's previously mentioned conversation of April 27, 1966 with Mr. Tendy (S.M. 53-54).

Thus, the vaunted grace that the defendants were supposed to enjoy from the Government's producing for us the above two Government officials as witnesses in this hearing conferred upon the defendants a wry boon. Substantially the same illusory "benefit" resulted from the Government's production of Miami F.B.I. Supervisor Swinney,

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whose testimony was far more significant for its non-disclosures than for what it disclosed. Thus, Agent Swinney, testifying on July 11 (S.M. 54 *et seq.*) was shielded by the Court from answering a host of questions which we submit were proper and important for the just exploration of the constitutional issues in this proceeding. Objections were sustained to questions whether Mr. Swinney had any written instructions concerning supervision of the use of electronic eavesdropping equipment (S.M. 61); who ordered the Miami electronic surveillance (S.M. 63-64); as to any written instructions for the tape-erasure practice (S.M. 71)—which Mr. Swinney stated had been adopted in his office on his own authority and apparently without knowledge or approval of any higher authority (S.M. 69-78, 82-88, 91-93); as to standard operating procedures for the reporting by F.B.I. agents themselves of electronic surveillance activities (S.M. 76-77); as to the purpose or subject matter of the Miami bugging of Tony Ricci (S.M. 89-91, and see 65-67); and as to why another Miami monitoring clerk named Fleck, mentioned in the logs had not been called as a witness (S.M. 93-95). As to Tony Ricci, Mr. Swinney had revealed that the Casa Maria-Dorey's eavesdrop had been ordered as part of an F.B.I. investigation of that individual; in preventing us from exploring the avenue of the Tony Ricci investigation, the Court precluded any chance we may have had to find out whether directly or derivatively the Tony Ricci situation led the Government to narcotics information relating to this case.

Also at the hearing session on July 11 we submitted the written statement of relevancy (Defendants' Exhibit B for identification) which we had promised to the Court in the

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colloquies about offer of proof (*supra*) in support of our Exhibit A list of witnesses. Because we respectfully consider the aforesaid Exhibit B Statement of Relevancy to be of prime importance in arriving at a sound appellate evaluation of our contentions herein that the Court below deprived the defendants of their constitutional rights of fair procedure in this hearing, we annex as an appendix to this brief a photocopy of said Exhibit B, and we especially solicit this Court's attention thereto. See also the discussion of our Exhibit B in the Argument, *infra*.

The Court on July 11 expressed itself very strongly in disfavor of our list of witnesses and our showing of relevancy, reiterating that the defendants would have to present adequate proof of the need for going into these evidentiary avenues (S.M. 52, 102-113). The Court did, however, direct the Government to submit documentation as to the "Schipani" reporting from Miami (S.M. 100-101), and stated that it might also wish further high-level disclosure by the Government as to the Georgia car-bugging (S.M. 114-123).

*July 18, 1967:*

See DB 12-14.

On the above date we were able for the first time to produce results of our investigation in the Columbus, Georgia area. We put on the stand the Black Angus Motel daytime and nighttime managers, Charles B. Brown and Oscar H. Kennington.

Mr. Brown testified concerning intensive headquarters narcotics investigation activities at the Martinique Hotel near the Black Angus (S.M. 30-36); this is a topic which



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should have been gone into detail had a plenary hearing been afforded and had we been allowed to call several other Federal and State narcotics officers. Mr. Brown testified also that he gave Federal Narcotic Agents Waters and Selvaggi a key to defendant-appellant Desist's room 108 at the Black Angus Motel on December 18, 1965, and that Waters had come back and said "He is the man" (S.M. 32-35, 49-53, 70).

Brown also testified that groups of the Agents congregated in a room opening off his office at the Motel (S.M. 39-40), during the course of which he heard the Agents saying, on the night of December 18-19, 1965, that Georgia Detective Hollis Bakers' car was following some defendants to Atlanta and that "they could hear from one car to the other" (S.M. 40-41).

Brown also testified that Agent Waters or another Agent had asked him whether Desist was getting any telephone calls and to let the Agent know if such occurred; Desist received a phone call, whereupon Brown rang the Agents' room 7 and told one of the Agents of the call but that it was in French; one of the Agents came to the switchboard to listen to the phone call but when Brown handed him the telephone the speakers had evidently hung up (S.M. 44-45). There was an issue in the hearing below as to whether this latter incident could have occurred, because Brown first placed the incident as having taken place on Sunday evening December 19 when Desist had indisputably left the Motel to return to New York; however, Brown later, in an obviously spontaneous way, corrected himself as to the time of the telephone incident in question; the entire record references needed for evaluation of Brown's

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credibility on this point are S.M. July 18, 1967, pp. 43-46, 59-63, 65-68, 73-75; and see also Kennington's testimony (July 18) at S.M. 81, 106-108, 152-155, where the apparent discrepancy as to Desist's motel check-out time is explained in an entirely satisfactory manner.

Kennington's testimony included, besides the items just noted as to the time factors involved in Brown's overhearing of the Desist telephone call, testimony that on December 20, 1965, Kennington having been invited by the Agents to look at the "haul" of heroin spread out on the bed in one of the Motel rooms, he heard the Agents discussing that they had a transmitter in the car which they were trailing and had "gotten good information" (S.M. July 18, 1967, pp. 84-104, 108-113).

In our argument *infra* we treat the District Court's rejection of the credibility of the testimony of Brown and Kennington.

Evidently having made this unfavorable credibility evaluation as to Brown and Kennington *ad hoc* during the July 18 session, the District Court announced at the conclusion of that session that the defense had failed to establish the right to a plenary hearing; the Court directed that one more session be held for the purpose of winding up the higher administrative phases of the Georgia car-bugging, and to allow the defendants to call agents Waters and Selvaggi (S.M. 156-158, 173-202).

*July 25, 1967:*

See DB 14-18.

It was not until the above hearing date that the Government under direction by the District Court saw fit to try to

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address itself to any even remotely adequate showing of the "Schipani" evolution of the information which had given rise to Mr. Morgenthau's disclosure on April 27, 1967 of the Georgia eavesdropping item.\*

At the July 25 session the Government produced its Exhibits 15-19, which did purport to trace the high-echelon aspects of the "Schipani" review procedure relating to the Georgia car-bugging. These Exhibits were introduced in conjunction with the testimony of Narcotic Agent Norman Matuoizzi, Assistant to the New York District Supervisor in charge of enforcement (S.M. July 25, 1967, pp. 2 *et seq.*). Neither these high-echelon "Schipani" documents nor agent Matuoizzi's testimony adequately reached or revealed the ultimate crucial "lower echelon" facts as to the electronic activities of the Narcotics Agents—facts which are available only through a plenary inquiry such as has not yet been had in this case. We have summarized what we consider the pertinent details of agent Matuoizzi's testimony in DB 14 (filed herewith—being our typewritten brief in the Court below). What we would emphasize here is that, neither through Matuoizzi nor any other proof, did the Government cover the decisive ultimate question of how the Georgia "Schipani" Exhibits denying that the car-bug worked had come into existence when, according to all of the Government's witnesses, nobody had ever made a written report about the Georgia car-bugging, nobody had ever seen such a report, and nobody knew of any such re-

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\* At the session of July 11 the Government had questioned Florida FBI Supervisor Swinney about the "Schipani" procedure regarding the Florida logs, which, upon request from the Department of Justice in Washington, Swinney forwarded to the latter agency (S.M. July 11, 1967, pp. 55-56, 61, 95-99).

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port. The Georgia "Schipani" material is said by the Government to have originated with the Federal Narcotics Bureau District 6, covering the latter State. But we have not been told how any one in District 6 was able to produce the present "Schipani" information to the effect that the Georgia car-bug did not work. And when we tried, repeatedly, to probe this question of how District 6 obtained or assembled the information, we were blocked by rulings of the Court below (e.g. S.M. July 25, 1967, pp. 45-50). We especially invite this Court's attention to the testimony just cited, as endowing with a kind of "out of this world" character the evasions of the Government (supported by the rulings of the Court below) when we tried to probe the question of how there could be a probatively worthwhile District 6 "Schipani" report assuring that the Georgia car-bug did not work, when no Government witness in this hearing (and no other Government proof herein) reached the topic of what factual basis District 6 had to support the making of this assurance, it being insisted by the Government that no contemporaneous writings on the subject had ever been made. Again, we especially urge this Court to scrutinize this vital feature of the case, with a view to asking why there is literally no proof in this record of any kind, oral or written, to substantiate District 6's post-factum, conclusory and self-serving assurance that the Georgia car-bug did not work. At least, had someone from District 6 with knowledge of this matter been produced as a witness by the Government, we could have interrogated such person as to just what conferences or office inquiries had transpired in District 6 which had led to District 6's "Schipani" report. It is incomprehensible that the Govern-

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ment has made no attempt to cope with this problem in the within hearing, except on the theory that a plenary inquiry would be undesirable from the Government's standpoint; and it is altogether incomprehensible that the Court below should have indulged the Government in this blatant obstruction of effective constitutional inquiry.

In light of the above described probative breakdown on the ultimate question of the truthfulness of the Narcotics Bureau's claims that the Georgia car-bug did not work, we addressed to the Court below, at the July 25 session, the following request (S.M. 53):

"Mr. Glasser: I spent 11 years in the government service making plenary surveys for Cabinet officers of various federal matters for report to Congress, the White House and so on.

As a lawyer I know that a plenary documentary survey could be made in this case to reveal actually the total file picture from which then an observer could determine, in a detective spirit, whether we have been given the total file picture by the government down to this time in regards to Narcotics Bureau files.

I hereby request that such a total file survey be made, presented to this court for initial scrutiny with a view to then being turned over to the defense attorneys."

Narcotics Agent Leonard S. Schrier testified on July 25, after Agent Matuozzi (S.M. 55 *et seq.*). Schrier knew of no reports (other than the "Schipani" material) concerning the Georgia car-bug (S.M. 64-67). Although he was ap-



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parently group leader of the narcotics agents assigned to this case (S.M. 56-57), he first heard of the Georgia car-bugging in connection with the "Schipani" developments and the defense was prevented from probing further into this topic (S.M. 67-68).

At the conclusion of this unsatisfying testimony of Agent Schrier on July 25, we repeated our request for a plenary survey of the Government's files (S.M. 68), the Court reserving decision.

Thereafter on July 25, 1967, Narcotics Agents Francis Waters and Frank Selvaggi testified. We shall not here repeat our description of their testimony which appears in DB 16-17, filed herewith.

What we wish to note here concerning the testimony of the latter two narcotics agents is that it imported into this record an apparently grave breach of credibility by Agent Waters, who had been one of the key investigation agents in the Georgia situation in December 1965. Waters testified in this hearing that although he had inquired of Motel manager Brown as to who was the occupant of Room 108 (Desist's room) (as Brown himself had testified—*supra*), Waters had never asked Brown for the key to Desist's room and had never entered that room (S.M. July 25, 1967, pp. 78-79, 81).

However, when Agent Selvaggi took the stand, after Waters' testimony (and Waters having left the courtroom), Selvaggi testified that one of the Motel managers, a man with white hair (evidently Mr. Brown), gave Agent Waters, in the presence of Selvaggi, a key to Room 108, but Selvaggi claimed they did not use the key (S.M. 107-108); Waters

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evidently kept the key, however, for a considerable time (S.M. 109).

On hearing this testimony of Selvaggi, we recalled Agent Waters to the stand. We wish that this Court could have seen for itself the evidences of crafty rumination which flitted rapidly over the physiognomy of Agent Waters when we now asked him whether at any time he had had in his possession a key to Desist's Motel room in Columbus, Georgia; exercising really quite impressive self-control as an apparent pastmaster in the art of feigning composure when confronted with sudden testimonial emergencies, Agent Waters, after a discreet pause, answered that he did have a key; the key was given to him by Mr. Brown; then, composure fully re-achieved (aided by one of those classic witness-rescue interruptions by Government counsel) Waters answered with urbanity, almost with boredom, further questions as to how long he had had the key, and whether he had used it (claiming, of course, that he had not used the key) (S.M. 113-117). See, again, Brown's testimony *supra*, that Waters had come back after receiving the key, and had said to Brown (referring to Desist), "he is the man". Waters admitted that he may have told Brown this in effect (S.M. 115-116).

Not the least interesting thing about the above described Waters-Selvaggi credibility fiasco in regard to the Desist motel room key, is that the Court below has made no mention whatever of this item in its opinion and report—where, however, the forthrightness and persuasiveness of all of the Narcotics Agents who testified in this hearing are hailed by the Court below in terms of warmest encomium.

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At the conclusion of the hearing on July 25, 1967, we renewed our requests for continuation and enlargement of the hearing, which the Court denied, but not without some expression of its dissatisfaction as to the posture of the record (S.M. 122-129—see especially 126-127).\*

## ARGUMENT

### I. INTRODUCTORY

The one conclusion, in regard to the hearing below, on which both sides and the Court below may agree, is that—except for the testimony of our witnesses Messrs. Brown and Kennington—the hearing record has produced no proof of unconstitutional electronic evidentiary taint affecting the cases of the present defendants-appellants. While we do urge that the testimony of Messrs. Brown and Kennington has significance (*infra*) notwithstanding the District Court's rejection of the credibility of their testimony, our main point now before this Court, upon the return of the remand proceeding, is that the Government and the District Court unconstitutionally foiled this Court's orders of remand; and while it would be intellectually and legally unjustified on our part to claim affirmatively that we would surely have proved unconstitutional taint in the remand proceedings below if the foiling had not occurred, we respectfully contend that there is more than enough in the record of these cases as a whole to justify us in now arguing that the foiling must be redressed by either a re-

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\* At p. 127 of the minutes of July 25, seventeenth line, the word "politeness" should read "obliqueness".

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newed order of remand directing the Court below to conduct a proper constitutional hearing, or by this Court's itself undertaking the task of *de novo* evidentiary hearing in order to vindicate the constitutional requirements which are applicable here.

Respectfully, it seems to us that it is by no means out of the question, as a matter of constitutional procedure and appropriate and needful judicial administration in the circumstances here presented, for this Court to undertake its own *de novo* evidentiary examination. Such would be in accordance with the real constitutional spirit of the "Schipani" *et post* decisions of the Supreme Court. It would also be in accordance with the doctrines which govern appellate review of issues of "constitutional fact" on a *de novo* basis. Furthermore, from the formal jurisdictional standpoint, it would be justified, we submit, as an exercise of this Court's powers under the "All Writs" statute, 28 U.S.C. § 1651. Finally, it would fall also within the conventional powers of this Appellate Court to supervise and monitor the decency of the administration of Federal criminal justice.

Nor would such a *de novo* evidentiary undertaking by this Court be prohibitively time-consuming, at least so far as our own proposed subject matter would engage this Court's consideration in such a *de novo* procedure. To a large extent, at least as concerns the portions of the record below consisting of the Government's proofs (those proofs comprising by far the bulk of the record), such a *de novo* evidentiary hearing by this Court could be, in the familiar sense, a *de novo* hearing "on the record"—so far as the defendants-appellants are concerned. The only exceptions

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which we would urge as regards such *de novo* "review on the record" would be with respect to the following:

(1) We would ask that this Court hear *de novo* the testimony of our witnesses Messrs. Brown and Kennington. We must say that we find dismaying the credibility evaluation by the Court below concerning these two witnesses. We would want this Court to see and to hear Messrs. Brown and Kennington in person. Brown, we submit, was an altogether convincing witness. Indeed it seemed to us that Brown displayed in a classic way the finest "old-fashioned" American qualities on the witness stand, qualities of forthrightness and of a doughtiness that were exceptionally impressive. As for Kennington, it is true that he wavered in his testimony, but the man obviously was not lying, and we would want this Court to test his performance for itself. As we above said, the District Court's flat rejection of the credibility of these two gentlemen is dismaying. What should a reviewing Tribunal do in such a situation where, again, the reviewing Tribunal has its own "Schipani" obligations, its own "constitutional fact" obligations, and its own obligations to monitor the constitutional decency of Federal criminal justice; and, also, where the reviewing Tribunal is expressly besought, as here, to exercise its jurisdiction under the "All Writs" Statute (*supra*)? We would not be so presumptuous as to contend (as though the answer to the latter question were conventionally obvious) that this Court has no choice but to adopt our suggestion for a *de novo* evidentiary hearing before this Court. We recognize that what we are asking this Court to do in that regard is not only unusual, it is unique to our knowl-



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edge. But we are asking this Court to do it, because we think that the needs of constitutional justice in the present circumstances so require, irrespective of definable "precedent." At the same time, it should be borne in mind that this suggestion of ours for a *de novo* evidentiary hearing by this Court is but one of the two alternatives which we are here urging. The other alternative, as above said, is that the matter be remanded anew to the District Court for a proper further hearing.

(2) In the event of this Court's acceding to our request for a *de novo* evidentiary hearing before this Court itself, the only other witnesses from the record below whom we would request this Court to hear would be Narcotic Agents Matuozzi, Waters, Selvaggi and Fitzgerald; and Assistant United States Attorney Tendy. We would want this Court to hear those witnesses so that the Court might apply its own powers of testimonial elicitation to explore in the needed way the question of the truthfulness of the assertions of the Narcotics Bureau witnesses that the Georgia car-bug did not work, and that the "Schipani" documentation relating to that topic is probatively satisfactory in terms of the "lower echelon" bases of that documentation (a matter which the present record has not reached at all, as we previously showed). And we would want Mr. Tendy back on the stand before this Court itself so that the facts could be elicited as regards Mr. Tendy's conversation with Agent Fitzgerald in the pre-trial proceedings before Judge Palmieri on the motion for suppression of the Waldorf Astoria eavesdropping (we refer to the unrecorded conversation in the latter pre-trial proceeding between Mr.

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Tendy and Agent Fitzgerald which resulted in informing Judge Palmieri that there had been no other electronic surveillance).

(3) In the event of either a *de novo* evidentiary hearing before this Court itself, or of a remand anew to the District Court, we would of course also urge that a plenary evidentiary exploration of the instant electronic issues be made, and that the Government be required to produce all of the necessary witnesses and all of the necessary documentation from the Government's files. If we may presume to do so, we would suggest that, in order to relieve this Court of the burdensomeness of such latter evidentiary procedures, this Court might see fit to assign to the District Court the plenary supplemental phase of the evidentiary hearing referred to in this paragraph, while reserving for itself the *de novo* reception of the testimony of our witnesses Brown and Kennington and of the Government witnesses mentioned in paragraph (2) above.

In the Court below we urged (DB 21-22) that, considering the posture of the record in that Court after the testimony of Brown and Kennington had been received, the credibility issue as to those witnesses was not whether the Court could conclude that their testimony had the requisite probative force to establish, as a matter of the ultimate merits of the case, that unconstitutional taint had occurred. Rather, we urged in the Court below (*ibid*) that the credibility issue at that juncture was whether, through Brown and Kennington, we had adduced sufficient indication of such taint to justify allowing the defendants a further opportunity for the plenary hearing which they were request-

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ing in view of the Government's having rested its case when it did. In its opinion and report herein (p. 10), the District Court referred to this contention of ours as being "more pettifogging than persuasive". May we respectfully suggest that the District Court was being more alliterative than alert. At least it is within this Court's province, under its power and duty of *de novo* review of "constitutional facts", to determine that Brown's and Kennington's testimony was not *so unarguably* devoid of credibility as to justify the District Court in torpedoing our further opportunity to explore the electronic issues after the Government, by resting its case when it did, had created the grotesque procedural roadblock previously described.

## II

## FURTHER AS TO THE BURDEN OF GOING FORWARD

From a reading of the opinion and report of the Court below in which the topic stated in the above heading is treated by that Court, we receive the impression that the Court below may well have over-simplified the principal decision of the Supreme Court as to the nature and the extent of the burden which must be met by a defendant in a criminal case who challenges illegally obtained electronic evidence. At p. 12 of its opinion and report the Court below has set forth what purports to be a quotation from the second *Nardone* case (*Nardone v. United States*, 308 U.S. 338, 341-342), relating to this question. When we perceived that the purported quotation from *Nardone* seemed to be textually garbled, we examined the Supreme Court opinion, and

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we must now point out that the Court below did apparently misconceive (through evidently unintentional misquotation) the *Nardone* language. The actual language of the Supreme Court in the second *Nardone* case (*supra*) was far from laying down any such explicit standard as the Court below thought, to the effect that the challenging party must satisfy the trial Court not only as to the use of illegal electronic surveillance, but also as to the "solidity" of the claims of taint, before the Government may be required to make plenary disclosure. The actual, correctly quoted entirety of the pertinent portion of the language in the second *Nardone* case appears at 308 U.S. 341-342, following a reference by the Supreme Court to the broad constitutional rule which it was there laying down that derivative and not only direct evidentiary use of forbidden electronic surveillance is banned:—

"In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. A sensible way of dealing with such a situation—fair to the intendment of §605, but fair also to the purposes of the criminal law—ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a sub-

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stantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.

Dispatch in the trial of criminal causes is essential in bringing crime to book. Therefore, timely steps must be taken to secure judicial determination of claims of illegality on the part of agents of the Government in obtaining testimony. To interrupt the course of the trial for such auxiliary inquiries impedes the momentum of the main proceeding and breaks the continuity of the jury's attention. Like mischief would result were tenuous claims sufficient to justify the trial court's indulgence of inquiry into legitimacy of evidence in the Government's possession. So to read a congressional prohibition against the availability of certain evidence would be to subordinate the need for rigorous administration of justice to undue solicitude for potential and, it is to be hoped, abnormal disobedience of the law by the law's officers. Therefore claims that taint attaches to any portion of the Government's case must satisfy the trial court with their solidity and not be merely a means of eliciting what is in the Government's possession before its submission to the jury. And if such claim is made after the trial is under way, the judge must likewise be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim. The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal, in ruling upon preliminary questions of fact. Such a system as ours must, within the limits here



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indicated, rely on the learning, good sense, fairness and courage of federal trial judges."

It may fairly be said that there were two focal points in the remand hearing below when, as we contend, the District Court went constitutionally astray in its procedural and evidentiary evaluation of the record, i.e., when the Court below failed to perceive correctly that the defendants' offers of proof or evidentiary showings merited reshifting the burden of going forward upon the Government (which had so abruptly and, we claim, prematurely, rested its case). These two focal stages occurred (1) when we submitted to the Court below our Exhibit B for identification, which was our statement of relevancy or offer of proof in support of our request for the witnesses named in our Exhibit A for Identification (Exhibit B, as previously stated, is annexed as an exhibit to this brief); and (2) when the District Court made its flat rejection of the credibility of our witnesses Brown and Kennington. The latter item has been sufficiently discussed heretofore; we now address ourselves further to the District Court's treatment of our aforementioned Exhibit B.

Our Exhibit B was submitted to the Court below at a stage (July 11) when we had not yet completed our independent investigation. On page 4 of Exhibit B (photocopy in appendix, *infra*) we enumerated six items of investigative information which we then believed we had. As will appear, the only ones of those six items as to which we were ultimately able to introduce evidence in this hearing—we did introduce evidence as to a seventh item, the Georgia car "bug" mentioned earlier in Ex. B (pp. 2-3)—were item "(1)" relating to illegal auditing of a telephone conversa-

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tion from Georgia, and item "(3)" relating to a trespassory entry and search in Georgia. As to the other four items we did—we may now represent to this Court—have information at the time. And, at the time of our submission of Exhibit B to the Court below, we hoped to substantiate our information from testimony of the witnesses requested in our Exhibit A. As to our Exhibit B item numbered "(2)", *re* telephone wire tapping in France, we hereby represent that we had information from defendant Le Franc, but we were never able to undertake the cost of the necessary investigation in France; we had hoped to substantiate this item *via* United States Army witnesses listed in our Exhibit A. As to the Exhibit B item "(4)", *re* trespassory entry and search in New York City, we hereby represent that we had information to such effect from appellant Desist, relating to his room at the Dixie Hotel in New York City in December 1965, but we were ultimately unable to undertake the financial cost of further investigating this item. As to our Exhibit B item "(5)", *re* use of an electronic device in auditing a Georgia conversation which had allegedly been audited non-electronically, this referred to the alleged Desist-Conder conversation at the Black Angus Restaurant in December, 1965, as to which we had information indicating that from the physical facts the alleged conversation could not have been audited non-electronically; but ultimately our investigator in Georgia informed us that he had been unable to obtain any probative information on this subject; we represent, however, that at the time of our submission of Exhibit B in the Court below we thought in good faith that this item had a realistic chance of being proved. As to our Exhibit B item "(6)",

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re extensive additional electronic surveillance in Europe and in this country, we represent that our Georgia investigator had informed us that he had been so advised by United States Army personnel, who in turn had suggested that further information would be obtainable from Army files and Army officers, hence the inclusion in our Exhibit A of the Army individuals there mentioned as requested witnesses.

Our thought in making the representations in the preceding paragraph is not to try to influence this Court by improper "off-the-record" matters. Our thought, rather, is that, as suggested earlier herein, the large interests of constitutional justice which we take it must dominate the present "Schipani" type of judicial inquiry, justify us in making the foregoing representations to this Court, even though we did not consider it feasible, as attorneys endeavoring to serve in a proper professional manner the interests of our clients, to import these matters into the record before the Court below.

Continuing this latter theme, we venture the following further suggestions, well realizing their delicacy and difficulty: Facing below as we did what appeared to us the extraordinary and almost incomprehensible obduracy of the Government in this entire electronic search controversy in this case, and facing also what likewise appeared to us to be the non-receptiveness towards the defendants' efforts on the part of the Court below in the course of the recent hearing, we may now frankly state to this Court that we (defense counsel) arrived at the deliberate professional policy judgment that, for the sake of our defendants, commencing around the end of the hearing session of June 26, we must

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guard "with eagles' eyes" against any possible professional-strategic ingenuousness on our part lest we find ourselves offering up our essential legal and factual positions as mere sacrificial offerings. If we may vary the metaphor, a stage was reached in the proceedings below when, in the light of the entire record of this prosecution, counsel for the appellants concluded that the situation in the remand hearing below was apparently hopeless regardless of the apparent merits, and that perhaps our best course would be to give no more hostages to fortune.

All of this, we perfectly well realize, would have been perhaps subject to criticism as unlawyer-like on our part, but for one previously mentioned axiom of the constitutional law of this country which was (and still is) very much in our thoughts as lawyers in this case, namely, that when issues of "constitutional fact" are involved in a criminal prosecution there operates or may operate the great residual, monitory power of the Appellate Tribunals, a power of literally *de novo* review. Furthermore, in the constitutionally novel framework of the "Schipani" type of review here involved, where Fourth Amendment privacy values coalesce with constitutional due process values and with the values embodied in the doctrine of judicial supervision of the administration of Federal criminal justice, we (defense counsel) felt entitled to make the grave policy decisions above intimated whereby our choice became one of retrenching the apparently futile further efforts along constitutional lines in the Court below and to hazard the fate of our constitutional contentions until the later day when, we knew, we would be coming back before this Appellate Court.

*Appendix D—Appellants' Brief Re Electronic Eavesdrop*

We cannot overstate our keen realization of the understatement that the foregoing rationale of our professional policy choices herein is unconventional. But we are dealing here with an unconventional problem, namely, the problem of how conscientious attorneys in a criminal proceeding should try to carry out their duty to their clients when they are convinced that they and their clients face an apparent thwarting of constitutional justice at a particular stage of the proceedings. We hasten to add that we intend no imputation whatever against the integrity of the Court below in what we are here saying. The pressures of a case like this one, and the consequences of those pressures, are entirely understandable without one's having to resort to unworthy imputations, and we hereby unhesitatingly and unqualifiedly disavow any such imputations. The legal and constitutional issues persist, however, and it is solely in terms of those issues that we are here speaking. Our respectful disagreement with the Court below, then, as is true also of our above statements that we came to view those disagreements as irreconcilable in the proceedings below, are intended as such and no more, i.e., they are intended as nothing beyond conscientious expressions of professional disagreements by attorneys faced with a judicial view to which they not only have been unable to subscribe but against which they have believed it necessary to guard their clients by the policy decisions above suggested and in the light of the doctrine of *de novo* review of issues of "constitutional fact".



Appendix D—Appellants' Brief Re Electronic Eavesdrop

III.

THE IMPACT ON THIS CASE OF *Berger v. New York*,  
— U.S. —, 18 L. Ed. 2d 1040

Although this Court's order of remand for further electronic review expressly excluded the Waldorf eavesdropping, we consider it proper to call the Court's attention to the above cited *Berger* decision, which we read as embodying a constitutional condemnation of "electronic search" so sweeping—unless full Fourth Amendment standards are obeyed—that the Waldorf-Astoria electronic surveillance herein must be disapproved.

IV.

THE IMPACT ON THIS CASE OF THE GRANTING  
OF CERTIORARI IN *Katz v. United States*, U.S.  
S. Ct., OCTOBER TERM 1966 No. 895.

Again, although the Waldorf-Astoria eavesdropping was excluded from the remand order herein, the action of the Supreme Court in the *Katz* case, *supra*, may decisively affect these appeals. As stated in 35 U.S. Law Week 3322, one of the certiorari issues in the *Katz* case is, "Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution".

*Appendix D—Appellants' Brief Re Electronic Eavesdrop*

## V.

ADOPTION OF POINTS URGED IN THE DEFENDANTS-APPELLANTS' BRIEF IN THE COURT BELOW, AND CONNOTED IN THE WITHIN SUMMARY OF THE PROCEEDINGS AND TESTIMONY BELOW.

For brevity, we hereby respectfully adopt and we herein urge all of the points of argument or contention which are presented in DB 1-25, copies annexed hereto; and in all prior pages of this brief, including those portions of our factual summary *supra* where we make presentation by way of contention.

## CONCLUSION

It is respectfully submitted that the procedural relief alternatively requested under "I" of the Argument in this brief *viz.*, that this Court should either remand the case anew to the District Court for a proper constitutional hearing, or that it should itself conduct such hearing, or that it should combine and divide such further hearing functions as between itself and the District Court—should be granted.

Respectfully submitted,

IRVING YOUNGER

*Attorney for Defendant-  
Appellant  
Samuel Desist*

ABRAHAM GLASSER

*Attorney for Defendants-  
Appellants; Frank Dio-  
guardi and Anthony Su-  
tera*

DAVID MARKOWITZ

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Appellant, Jean Claude  
LeFranc*

ARNOLD C. STREAM

*Attorney for Defendant-  
Appellant, Jean Nebbia*

## APPENDIX E

**Defendants' Exhibits A and B In Remand Hearing  
In District Court Re Electronic Eavesdrop Issues**

**Defendants' Exhibit A**

July 6, 1967

U.S.A. v. DESIST ET AL, U.S. CT. APP., 2ND CIR.,  
DOCKET NO. 30849, ON REMAND BEFORE HON.  
EDMUND L. PALMIERI, U.S.D.J.

**TENTATIVE LIST OF WITNESSES FOR DEFENDANTS**

	Narcotics Bureau Agent Fitzgerald
	" " " Kiere
	" " " Norris M. Durham
	" " " Walter J. Smith
	" " " Klempner (Joseph T.)
Ex-	" " " Weinberg (Jerome M.)
	" " " Leonard S. Schrier
	" " " Peter Gruden
	" " " Lee Hughes
	" " " Jessup
	" " " John E. Thompson
	" " " Francis E. Waters
	" " " Dugan
	" " " Selvaggi
	" " " Adaneski
	" " " Matuozzi
	" " " Rice
	" " Official or Agent who was in direct or immediate charge of the activities of the foregoing agents in this case.

United States Customs Service Port Investigator Paul  
Boulad

*Appendix E—Defendants' Remand Exhibits*

Assistant United States Attorney William M. Tendy

FBI Agent Stadtmiller

FBI Agent or Clerk ..... (Supervisor of  
FBI Clerks Dougherty, Moseley and Bonner, Miami,  
Florida)

FBI Agent or Official who was in charge of the Miami  
office for all years 1962-1965 inclusive.

FBI Official from National Office in Washington, D.C. who  
would have authoritative knowledge of overall FBI  
procedures re electronic surveillance for all years 1962-  
1965 inclusive.

Narcotics Bureau Agent or Official who would have such  
overall knowledge re Narcotics Bureau electronic sur-  
veillance for said years.

U.S. Army Commanding General Fort Holiburg, Maryland,  
or Chief File Clerk or Record Clerk or other officer or  
official having charge of C.I.C. (Counter Intelligence  
Corps) or C.I.D. (Criminal Investigation Division) re  
Desist, Conder et al. during all herein operative times.

Same as last preceding item In Re appropriate officer or  
official at Fort Gordon, Georgia, Fort Benning, Georgia,  
Fort Bragg, North Carolina, and U.S. Army E.T.O.  
comprising Orleans (France) Depot.

Fred W. Ratteree, Avis Car Rental, Columbus, Georgia

H. C. Pair, Manager of Waldorf Motel, Atlanta, Georgia

E. Warren Whiteman, Credit Manager, Waldorf-Astoria  
Hotel, New York, N. Y.

*Appendix E—Defendants' Remand Exhibits*

FBI Agent or Clerk Edward E. Fleck—Miami

FBI " " " Mullen (1 sp.)—Miami

Georgia Police Officer Hollis Baker, and entire supervisory echelon plus entire subordinate echelon re Officer Baker.

It is respectfully emphasized that the above list is tentative.

It is also respectfully noted that production of records or other documents In Re any or all of the above listed persons will or may be requested, by subpoena duces tecum if necessary.



**Defendants' Exhibit B in Remand Hearing**

July 11, 1967

U.S.A. v. DESIST ET AL., U.S. CT. APP., 2ND CIR.,  
DOCKET NO. 30849, ON REMAND BEFORE HON.  
EDMUND L. PALMIERI, U.S.D.J.

\* \* \* \* \*

STATEMENT FOR DEFENDANTS EXPLAINING RELEVANCY OF  
TESTIMONY SOUGHT FROM WITNESSES LISTED IN "TENTA-  
TIVE LIST OF WITNESSES FOR DEFENDANTS" DATED  
JULY 6, 1967.

This statement of relevancy is expected to be supplemented by oral presentation of counsel in the hearing before Judge Palmieri on July 11, 1967, or by subsequent written or oral presentation prior to July 18, 1967. Defendants also respectfully reserve the right to offer a statement of relevancy as to the testimony of witnesses not listed in the type-written "tentative list" dated July 6, 1967.

Certain general preliminary observations seem to be appropriate on the issues of relevancy herein, and indeed on the overall procedural issues of this remand proceeding.

*First*, we are aware that Judge Palmieri is concerned lest our efforts be heading towards what His Honor characterized on July 6, 1967 as "a grandiose fishing expedition". Some "fishing" methods have been forced upon us by the Government's election to rest its case after calling only FBI clerical witnesses from Miami, Florida, and one Narcotics Bureau witness (Mr. Kiere) whose direct testimony was limited to the question of audibility of the conversations in the Avis Rental car in Georgia. The Govern-

*Appendix E, Defendants' Remand Exhibits*

ment's decision to rest at that juncture, taken together with our own repeated prior announcements that we would be handicapped in cross examining Government witnesses and in presenting our own proofs until after completion of our own investigation, gives rise to a situation which at the present moment seems to be basically repugnant to the "Schipani" review concept and to the orders of the Court of Appeals. We view the "Schipani" procedure as placing a duty on the Government to make plenary disclosure, *a fortiori* when a hearing of the present type is underway.

*Second*, specifically as to the admitted "bugging" of the Avis car, the Government's election to rest at the stage when it did has deprived Judge Palmieri, the Court of Appeals, and the defendants of direct proof by the Government as to any details of the method and agency of the "bugging" of that car. It is not enough that the Government has admitted the "bugging" of the car was trespassory. The case bristles with unanswered questions on this subject; perhaps the foremost such unanswered question is that of Agent Kiere's credibility in testifying that the Avis car "bug" did not function audibly; it is indispensable, for a further adequate exploration of this question, that the fullest possible picture be developed as to the agency and technical method of the "bug" with a view to eliciting why it did not work, if in truth it did not work. For these reasons alone, without more, we contend it is necessary to have the testimony of all of the Government agents and other persons who may be in a position to reveal the entirety of the circumstances of the Avis car "bug".

*Appendix E, Defendants' Remand Exhibits*

Furthermore, the defense counsel are now in a position to be able to represent that we have information that the Avis car "bug" did work. Our need and our desire, then, to explore this topic through the avenue of a seemingly unavoidable "fishing" interrogation of numerous persons, are not in fact motivated by mere "fishing" curiosity, but by a good faith need and desire to *confirm* the information just mentioned.

With the above preliminary observations in mind, we offer further suggestions of relevancy as follows:

The amended order of the Court of Appeals, in allowing us to explore without limit (except as to the Waldorf-Astoria subject matter previously explored) the question of whether any Governmental personnel engaged in any other electronic eavesdropping of any kind which related to this case, has inevitably imported into this remand hearing some degree of "fishing". Had the Government not rested its case when it did, and had the presentation of all of the Government's proof (in a plenary and unstinting manner) been deferred as we requested until after completion of our own investigation, much of our "fishing" could have been avoided through affording to us instead more adequate avenues *via* cross examination of witnesses called by the Government.

In any event, our exploration along the broader lines allowed by the Court of Appeals in regard to any other electronic eavesdropping, does not depend even at this moment on mere unsupported "fishing" curiosity. Defense counsel are now in a position to represent that we have

*Appendix E, Defendants' Remand Exhibits*

information as follows:—(1) Telephone conversations of at least one of the defendants were illegally audited at a relevant time in Georgia. (2) Telephone conversations of at least one of the defendants were audited, in a manner which would be illegal under American law, at a relevant time in France. (3) A trespassory entry and search were made in private premises of at least one of the defendants at a relevant time in Georgia, indeed at a time and place in Georgia of such prime and probably dispositive relevancy as to make it urgently necessary to inquire in the most full manner whether said trespassory entry and search had relation also to installation or use of a "room bug". (4) In all probability there occurred a similar trespassory entry and search in the private premises of at least one defendant at a relevant time in New York City. (5) In all probability an alleged non-electronic auditing of another conversation of at least one defendant at a relevant time in Georgia was done with aid of an electronic device. (6) From witnesses whom, unfortunately, we may not be able to subpoena, it has been learned that electronic surveillance was massively and pervasively resorted to both in Europe and in this country practically from the inception of the alleged narcotics conspiracy.

In the light of the items enumerated in our last preceding paragraph—as to all, of which, we repeat, defense counsel hereby represents that we are already in possession of concrete and distinct information—it is respectfully urged that each and every one of the persons or sources listed in our typewritten "tentative list" of July 6, 1967

*Appendix E, Defendants' Remand Exhibits*

ought to be brought to the attention of Judge Palmieri and the Court of Appeals.

Respectfully submitted,

ARNOLD C. STREAM

IRVING YOUNGER

DAVID M. MARKOWITZ

ABRAHAM GLASSER

Counsel for Respective Defendants





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**In the Supreme Court of the United States**

**OCTOBER TERM, 1968**

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**No. 12**

**SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE  
LEFRANC, JEAN NEBBIA, AND ANTHONY SUTERA,  
PETITIONERS**

**v.**

**UNITED STATES OF AMERICA**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT**

---

**BRIEF FOR THE UNITED STATES**

---

**OPINION BELOW**

The opinion of the court of appeals (R. 4947-4978),<sup>1</sup> and the opinion of the district court following a remand for consideration of certain issues relating

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<sup>1</sup> "R." refers to the multi-volume, consecutively paginated record certified by the Clerk of the Court of Appeals. The record has not been printed, pursuant to an arrangement made among the parties and the Clerk of this Court when it was contemplated that the case would be argued at the last session of the 1967 term.

to electronic surveillance (R. 4738-4775), are reported at 384 F.2d 889 and 277 F. Supp. 690, respectively.

### JURISDICTION

The judgment of the court of appeals was entered on October 13, 1967 (R. 4979). The time within which to file a petition for a writ of certiorari was extended by Mr. Justice Harlan to and including December 12, 1967. The petition for a writ of certiorari was filed on December 12, 1967, and was granted on March 4, 1968. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the requirement first announced in *Katz v. United States*, 389 U.S. 347—that non-trespassory electronic monitoring of conversations could not be conducted, consistent with the Fourth Amendment, without a proper warrant—should relate back to control cases then pending on appeal.

2. Whether the district court properly construed and applied the pre-*Katz* law in admitting evidence of petitioners' conversations which were overheard without a physical trespass by means of an ordinary microphone installed next to the crack beneath a doorway separating petitioners' hotel room from another.

3. Whether the district court properly determined after an adequate hearing that the use or attempted use of certain other electronic surveillance equipment in no way affected the instant prosecution.

4. Whether, as alleged by petitioners, a variety of other errors occurred during the course of their trial, and, if so, whether any such errors, considered individually or collectively, warrant reversal of their convictions.

### STATEMENT

Petitioners were convicted by a jury, in the United States District Court for the Southern District of New York, under an indictment charging that they and one Herman Conder<sup>2</sup> conspired to import large quantities of narcotic drugs from France and to conceal them in the United States, in violation of 21 U.S.C. 173 and 174 (R. 2537-2540). On August 30, 1966, petitioner Desist was sentenced to imprisonment for a term of 18 years (R. 3789), petitioner Dioguardi for 15 years (R. 3790), petitioner LeFranc for 20 years (R. 3791), petitioner Nebbia for 20 years (R. 3792), and petitioner Sutera for 10 years (R. 3793).<sup>3</sup> The court of appeals affirmed the convictions (R. 4947-4979; Pet. App. 1a-32a).

1. The evidence at trial showed that in July 1965 petitioner Desist, a retired United States Army Major living in Orleans, France, offered \$10,000 to one Herman Conder, a warrant officer at a nearby Army base who was about to be reassigned to Fort Benning, Georgia, if Conder would ship a used food freezer to

<sup>2</sup> The case against Conder was severed prior to trial. Much of the evidence against petitioners consisted of Conder's testimony together with that of various government agents.

<sup>3</sup> Petitioners LeFranc and Nebbia were also fined \$5000 each (R. 3791-3792).



the United States as part of his household effects (R. 30-39). Conder agreed, and Desist delivered to Conder's residence a used freezer, in the insulation of which 209 pounds of pure heroin were later secreted (R. 39-49; see R. 65-72, 318-321, 323-325, 329-331, 358-361; Gov. Exhs. 81A-F, 89A-F). In September 1965, before departing with his family for the United States, Conder shipped the freezer along with his other household goods (R. 49-50). In late November, after the freezer had been delivered to the house trailer where Conder was living near Fort Benning, Conder wrote a letter to Desist informing him that the freezer had arrived (R. 52).

On December 11, petitioner Nebbia, a French national, flew from Paris to New York (R. 1427-1428; Gov. Exh. 43). On Sunday, December 12, Desist flew from Paris to New York, telephoned Conder, and arranged to visit him in Georgia at the end of the week (R. 52, 1428-1429; Gov. Exh. 44). On the evening of December 16, Desist met Nebbia in the latter's room in the Waldorf-Astoria Hotel in Manhattan and discussed plans for picking up the heroin in Georgia that weekend. Desist told Nebbia that he first had to fly to Rochester to see "the boss" but would then proceed to Columbus, Georgia (where Fort Benning is located) and meet him there (R. 373-375, 557-560, 568-609). The following afternoon, Friday, December 17, petitioner LeFranc, also a French national, met Nebbia in the same hotel room, told him to rent a car when he arrived in Columbus the next day, and said that he would wait in a Columbus motel while Nebbia would "take care of things" (R. 375-377, 561-563, 611-627).

The conversations in the hotel room were overheard by means of a non-trespassory electronic surveillance (see *infra*, pp. 7-10).

That evening, on a Manhattan street, LeFranc met petitioners Dioguardi and Sutera who had flown to New York from Miami earlier in the day and registered under false names at a Manhattan motel (R. 1015-1018, 1361-1367, 1428). They proceeded together to a bar in a nearby restaurant called Adano's (R. 1017-1019, 1054-1058, 1137-1138). LeFranc there indicated that he would be going to Atlanta the next morning (R. 1057). Dioguardi placed a telephone call during which he stated that he was with the individual who would be leaving for Atlanta the next morning, and that he would see him again, probably on Monday or Tuesday (R. 1139). Dioguardi then returned to the bar and stated that everything was "all right on [his] end" but that several problems remained to be worked out (R. 1059-1060). Sutera added that he and Dioguardi had not yet seen "anything" (R. 1060, 1140). LeFranc said he had explained this to his "friend", who assured him that the "merchandise" was "here already"; that all that remained was to "go down there" and "pick it up", and then to make the transfer to Dioguardi and Sutera at a mutually acceptable place (R. 1060, 1140). Sutera proposed that he and Dioguardi accompany LeFranc to Georgia to save him an extra trip, and Dioguardi added that "your friend should trust us more" (R. 1060-1061, 1140-1141). LeFranc replied that "[t]hese transfers are risky business, there is much to lose here and one cannot be too careful, so we must

insist that we do it our way. In the past people have been betrayed, and everything has been lost, even the people" (R. 1061-1063, 1141-1142). He noted that not even he had met his friend's contact (R. 1063, 1142). LeFranc assured Dioguardi and Sutera that once he received the merchandise, he himself would make the transfer to them, adding that he would like to transfer it as soon as possible since he did not wish to hold the merchandise too long (R. 1063, 1142). He suggested that the transfer be made to a car supplied by Dioguardi and Sutera, and specifically urged that it be done at night for added safety (R. 1064, 1142). He would be "much relieved", LeFranc said, after the transfer had been accomplished (R. 1064, 1143). He indicated that he would telephone Dioguardi and Sutera in Miami to arrange further details after obtaining possession of the merchandise, probably on Monday or Tuesday (R. 1141-1142). A short time later, Dioguardi placed a second telephone call from the restaurant and informed the person called that his negotiations that evening involved a "once-a-year deal" (R. 1144). The conversations in the bar were overheard by three undercover agents of the Bureau of Narcotics who were present among the customers (R. 1053, 1057-1065, 1137-1145).

That same evening, Desist arrived in Columbus from Rochester and informed Conder that two men, whom he later said Conder would recognize as Frenchmen, would pick up the contents of the freezer the following day (R. 54-56, 63). The next morning, Saturday, December 18, Nebbia and LeFranc flew

from New York to Columbus via Atlanta and were met at the Columbus airport by Desist (R. 627-630, 1368-1370, 1457-1459). Nebbia and LeFranc rented a car, dropped off Desist in downtown Columbus, and then drove around the Columbus area in a circuitous fashion, stopping at one point to purchase two suitcases and a large foot locker (R. 1371-1385, 1461-1469). That evening they informed Desist that they were postponing the pickup for a day because they suspected that they had been followed that afternoon, and Desist informed Conder of the change in plans (R. 60-62, 1470-1476). The following morning, Desist told Conder to buy some suitcases and pack them with the contents of the freezer, in order that they might be ready when the Frenchmen returned (R. 64-65). Conder purchased four suitcases, added two of his own, and filled them with plastic bags of heroin which he removed from the lining of the freezer (R. 66-72). Later that day, Nebbia and LeFranc met Desist, again surmised that they were being followed, and decided to postpone the pickup for several more days (R. 74-75, 1449-1450). They drove to Atlanta and then flew to New York, where they were arrested the next morning (R. 1566-1569, 1573). At about the same time, Conder was arrested in Columbus and the cache of narcotics was seized (R. 76-78, 318-321, 1490-1492).

2. At an early point in the pre-trial proceedings, the government informed the district court and defense counsel that federal agents had used an electronic device to listen to conversations which had taken place in Nebbia's room in the Waldorf-Astoria



Hotel, and suggested that a hearing be held to resolve any questions concerning the legality of the agents' conduct (R. 3156-3158). At the instance of the district court, the proceedings were begun in the room of the Waldorf-Astoria Hotel from which the surveillance had been conducted, and the eavesdropping equipment was reinstalled by the agents in precisely the same manner as it had been at the time of the surveillance. The agents were sworn and were questioned by both the court and defense counsel (R. 3156-3159, 3206-3226). Thereafter, the proceedings were returned to the courtroom and a two-day evidentiary hearing was held (R. 3373-3786).

The evidence adduced at the hearing showed that on December 11, 1965, petitioner Nebbia registered at the Waldorf-Astoria Hotel and was assigned room 1602 (R. 3447, 3449-3450, 3468-3469). Three days later, on December 14, the Bureau of Narcotics received information that petitioner Nebbia was staying there (R. 3765-3767). That afternoon, four federal narcotics agents arrived at the hotel (R. 3427-3428, 3505-3506, 3746-3747, 3769). Two of the agents, Kiere and Smith, spoke with the manager, asked for the number of Nebbia's room, and requested a room on the same floor as close as possible to Nebbia's (R. 3431-3434, 3505-3507). The manager informed them that the adjoining room, number 1600, was available (R. 3429, 3506-3507). Upon entering room 1600, the agents noted that a door in the wall separated rooms 1600 and 1602. Kiere opened the door in the presence of the other agents and found a second door,



which could not be opened from room 1600, immediately behind it (R. 3438, 3510, 3524). Smith placed his ear momentarily against the second door, heard nothing, then closed the first door (R. 3511-3512, 3525, 3527-3528, 3749). The first door was not opened by the agents again (R. 3524-3525, 3528, 3758).

Late that afternoon, agent Durham of the Bureau of Narcotics arrived at room 1600 with a tape recorder and other electronic equipment (R. 3392-3395, 3423, 3430). Kiere pointed out the doorway leading to room 1602, and stated that there was a second door behind the first (R. 3404, 3415-3417). Durham proceeded to place a small, ordinary microphone against the base of the door in room 1600, with its face tilted toward the three-eighths inch space between the bottom of the door and the top of the door sill (R. 3417-3420). No part of the microphone or any other apparatus extended into or under the first door (R. 3419, 3441). Durham fixed the microphone in place with adhesive tape, and then, in order to minimize its sensitivity to any sounds in the agent's room, he placed a bath towel over the microphone and along the clearance space beneath the door (R. 3211-3213, 3383-3384, 3412; Gov. Exhs. 3, 4).<sup>4</sup> Durham ran a cable from the microphone into the bathroom in 1600, where

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<sup>4</sup> Government Exhibits 1 through 4 are photographs of the recreated installation. Since the exhibits have not been included in the certified record, we are lodging with the Clerk of the Court a copy of the government's appendix in the court below, which contains copies of those exhibits at pages 133a through 139a.

it was plugged into an amplifier which was connected to a tape recorder (R. 3210-3211, 3218-3219, 3383-3384, 3412; Gov. Exhs. 1, 2). The tape recorder could be operated manually, or by a voice-actuated switch which would activate the recorder whenever the sounds entering the microphone reached a certain level (R. 3223, 3225). Any sounds being recorded could be heard simultaneously on a speaker (R. 3215, 3222).

Thereafter, from the afternoon of December 14 through December 18, agent Kiere, who was fluent in French, operated the equipment manually to overhear and record conversations which took place in Nebbia's room, including the conversation between Nebbia and Desist on December 16 and the conversation between Nebbia and LeFranc on December 17 (R. 3214-3216, 3225-3226). During the surveillance, Nebbia's room was never entered by the agents, the second door was never opened, and no equipment was attached to that door (R. 3404-3405, 3424, 3432-3433, 3438, 3441-3442, 3478, 3493, 3514, 3528-3529, 3748, 3756-3758, 3771-3772, 3776).

At the conclusion of the hearing, the district court found that "nothing has been adduced to indicate there was a physical trespass or any basis upon which the evidence should be suppressed" (R. 3778), and that "there was no illegality to the procedures followed by the agents" (R. 3781).<sup>5</sup> The court accord-

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<sup>5</sup> The court specifically found that the electronic surveillance was not in violation of State law (R. 3778-3780; see *infra*, p 38 n. 22).

ingly denied the defense motion to suppress the evidence thereby obtained (R. 3781).<sup>6</sup>

## SUMMARY OF ARGUMENT

### I

In *Katz v. United States*, 389 U.S. 347, this Court held for the first time that non-trespassory electronic monitoring of private conversations was within the purview of the Fourth Amendment, and that warrants must be obtained before initiating such monitoring. Since, two years earlier, federal narcotics agents in the instant case had used a non-trespassory electronic device, without a warrant, to overhear incriminating conversations by petitioners in a room at the Waldorf-Astoria Hotel in New York City, and since the evidence thus obtained had been used at trial, this case must be reversed if the *Katz* requirement is to be applied retroactively.

In five recent cases—*Linkletter v. Walker*, 381 U.S. 618; *Tehan v. Shott*, 382 U.S. 406; *Johnson v. New Jersey*, 384 U.S. 719; *Stovall v. Denno*, 388 U.S. 293; and *DeStefano v. Woods*, No. 559, 1967 Term, decided June 17, 1967—this Court has analyzed the considerations bearing upon the propriety of prospective or retrospective application of newly announced constitutional rules of criminal procedure. Under the approach developed in those cases, the

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<sup>6</sup> The facts relating to the discovery of two other instances of actual or attempted electronic monitoring involving petitioners, are included later in this brief, as a preface to our discussion of this point (see *infra*, pp. 58-59).

Constitution neither prohibits nor requires retroactive effect, but each situation must be examined in three aspects—whether the *purpose* to be served by the new rule will be furthered by its retroactive application, whether government agents had acted in *reliance* upon the prior rule, and whether there would be an adverse *effect* upon the administration of justice if the new rule were held to control past cases. In applying these criteria, the Court has consistently held new rules to be retrospective in effect only where the newly adopted standards relate directly to the inherent fairness of the guilt-determining process at a criminal trial. In each of the above cases, retroactive application of the particular rule in question was found not to be warranted. Using the same criteria, a retroactive application of the *Katz* rule is similarly unwarranted.

The purpose to be served by the rule announced in *Katz* is to prevent law-enforcement agents from electronically monitoring conversations which a subject seeks to preserve as private and reasonably assumes to be private, without first securing judicial sanction. Retroactive application of the *Katz* requirement, however, cannot change the fact that law-enforcement officers, relying on prior law, have in the past used non-trespassory monitoring devices without first obtaining warrants. Also, the deterrent aspect of the rule will not be advanced by making the rule retrospective. Moreover, the *Katz* rule does not serve to enhance “the reliability of the fact-finding process” (*Stovall v. Denno*, 388 U.S. at 298) or to avoid the “danger of convicting the innocent” (*Johnson v. New Jersey*, 384

U.S. at 728)—the one essential determinative of retrospective application. And the “reliability and relevancy” of evidence obtained by non-trespassory surveillance of course is obvious (see *Linkletter v. Walker*, 381 U.S. at 639).

The reliance of law enforcement authorities upon pre-Katz law in this area is apparent. The distinction between an electronic eavesdropping which does not involve a physical intrusion into a constitutionally protected area, and an electronic eavesdropping which does involve a trespass, was drawn by this Court in *Goldman v. United States*, 316 U.S. 129, and *Silverman v. United States*, 365 U.S. 505. See *Lopez v. United States*, 373 U.S. 427, 438-439. The lower courts have been uniform in applying that distinction. Only a week prior to the agents' installation of the eavesdropping equipment in this case, this Court denied a petition for a writ of certiorari to review a Second Circuit decision affirming, on the basis of *Goldman*, the propriety of a virtually identical installation by the same narcotics agent. *United States v. Bardo-Bolland*, 348 F.2d 316, certiorari denied, 382 U.S. 944. However desirable the change of law which has now taken place, the “operative fact” (*Linkletter v. Walker*, 381 U.S. at 636) is that the conduct of the agents, in attempting under the exigencies of the situation to thwart a major importation of pure heroin, in no respect constituted an intentional evasion of a known constitutional standard.



The effect upon the administration of justice of retroactive application of the rule announced in *Katz* would admittedly not be of the same dimension as that presented by the situations involved in *Stovall* or *Johnson*. Electronic surveillance has, however, played a significant role in some cases of major importance. The potential effect upon the administration of justice which would be occasioned by reversals of such cases, even though limited in number, is of no less practical significance than the effect of reversals in a larger number of more routine cases.

Since there is no reason, under the announced criteria, for a general retroactive application of the *Katz* rule, there is similarly no reason to apply it to cases which were pending on appeal when *Katz* was decided. For purposes of retroactivity, this Court, upon thorough consideration of the problem, has held in its recent cases that no distinction is justified between convictions which were final at the time of the pertinent decision and convictions which were then at various stages of trial and direct review. *Johnson v. New Jersey*, 384 U.S. at 733; *Stovall v. Denno*, 388 U.S. at 300-301; *DeStefano v. Woods*, No. 559, 1967 Term, slip op. p. 4 n. 2.

## II

Under the law applicable prior to the time of the *Katz* decision, the district court did not err in admitting evidence of the monitored conversations. This Court and lower courts had theretofore sustained, against constitutional challenge, the admissibility of

evidence obtained by electronic surveillance where there had been no physical trespass into a constitutionally protected area. *Goldman v. United States, supra*; *Silverman v. United States, supra*; see *Lopez v. United States, supra*. Here, after a thorough evidentiary hearing during which the electronic equipment was displayed, reinstalled, and explained, the district court found that the monitoring of petitioners' hotel room did not involve a trespass. The evidence plainly supports that finding; the testimony of the agents was clear and uncontradictory, and the character of the recordings is fully compatible with the nature of the installation described by the agents. There was thus no reason to exclude the evidence of the conversations.

### III

The hearing held in the district court on remand, following the government's disclosure to the court of appeals of two instances of use or attempted use of electronic equipment with respect to certain of petitioners, other than the Waldorf-Astoria incident, was more than adequate. It clearly showed that in neither instance was any matter overheard which bore even remotely on the instant case. Inter-governmental correspondence and the testimony of numerous agents of the F.B.I. and the Bureau of Narcotics conclusively established that, aside from the Waldorf-Astoria surveillance, only petitioner Dioguardi had been overheard. That had occurred long before the formation of the conspiracy charged in the instant indictment, in a restaurant in Dade County, Florida, when he was talking about matters wholly unrelated to the present

case. In December 1965 Bureau of Narcotics agents had attempted to use an electronic device secreted in a car rented by petitioner Nebbia in Columbus, Georgia, but the device failed to function and the agents heard only static.

The court of appeals was warranted in excluding from the scope of the remand hearing the electronic monitoring at the Waldorf-Astoria since that incident had been thoroughly explored at trial. Although petitioners contend that the hearing was unduly circumscribed in terms of the opportunity afforded them for showing taint, the record, totalling more than 800 pages taken on eight different occasions over a more than one-month period, amply refutes this contention. As indicated, the government's evidence clearly showed that the trial proof was not tainted by the prior occasions of electronic surveillance or attempted surveillance other than the Waldorf-Astoria incident. Petitioners introduced two witnesses with respect to the 1965 Georgia episode, whom the court permitted to testify also as to an alleged illegal (non-electronic) search in Georgia by federal agents. The court's finding that the testimony of these witnesses was not credible is amply supported by the record. While the court declined to permit the defense to call other witnesses, it did so only after considering a proposed "statement of relevancy" with regard to their testimony, and justifiably concluded that to allow the witnesses to be called would convert the proceedings into a "grandiose fishing expedition." In short, the breadth of the hearing was more than sufficient to afford peti-

tioners the opportunity to show that the case against them was the fruit of the poisonous tree; yet such proof was not provided. Far from being unduly circumscribed, the hearing demonstrates the extent that judicial resources may be consumed in the pursuit of groundless claims of taint arising from electronic overhearing.

#### IV

All of the other points raised and discussed by petitioners relate either to the sufficiency of the evidence or to the propriety of certain discretionary determinations made by the trial court. Each of these various arguments was fully considered and properly rejected by the court of appeals. Viewed either individually or collectively, they would not warrant reversal of petitioners' convictions.

#### ARGUMENT

- I. THE REQUIREMENT FIRST ANNOUNCED IN *KATZ v. UNITED STATES*, 389 U.S. 347, SHOULD NOT BE HELD APPLICABLE TO PRIOR TRIALS WHERE RELIABLE EVIDENCE HAD BEEN OBTAINED AND INTRODUCED IN CONFORMITY WITH THE LAW AS IT THEN EXISTED.

In *Katz v. United States*, 389 U.S. 347, decided December 18, 1967, this Court held that where a person conducting a conversation which he "seeks to preserve as private" has "justifiably relied" upon the privacy afforded by the place where he is situated—there, a public telephone booth—monitoring of that conversation by law-enforcement agents utilizing electronic equipment, whether or not a trespass is involved, is subject to the requirements of the Fourth Amendment

(389 U.S. at 350-353). Evidence obtained by means of such electronic surveillance can thus be introduced at trial only if a judicial warrant is first secured, upon a showing of probable cause, to conduct such monitoring (*id.* at 354-359). In so concluding, this Court stated that the doctrine enunciated in *Olmstead v. United States*, 277 U.S. 438, and *Goldman v. United States*, 316 U.S. 129, holding the Fourth Amendment inapplicable where no physical trespass into a "constitutionally protected area" had occurred, "can no longer be regarded as controlling" (389 U.S. at 351-353). In the instant case, at a time two years prior to the holding in *Katz* that the warrant requirement applies despite the "absence of a physical intrusion into any given enclosure" (*id.* at 353), federal narcotics agents investigating unlawful heroin importation engaged in non-trespassory electronic surveillance, without first obtaining judicial authorization, to overhear incriminating hotel-room conversations by petitioners Desist, LeFranc, and Nebbia. Evidence of those conversations was introduced at trial. If the requirement first announced by the *Katz* decision is deemed to control not only future electronic monitoring but past surveillance conducted pursuant to the law as it was then construed and applied, then petitioners' convictions must be reversed. We urge, however, that there is no sound reason for such a result, and that, under the criteria announced by this Court in assessing the propriety of retrospective application of newly announced constitutional standards, application of the *Katz* holding to prior cases is not warranted.



***A. There is no reason for a general retroactive application of the Katz requirement.***

As an initial matter, it is essential to recall what *Katz* did and did not hold. Under *Katz* the constitutional propriety of electronic surveillance no longer depends upon whether a physical intrusion into a constitutionally protected area is involved. Persons who engage in conversations which they seek and can reasonably expect to preserve as private are entitled to the protections of the Fourth Amendment. But the Court also concluded that electronic surveillance which otherwise would be prohibited might be conducted, consistently with the Fourth Amendment, if undertaken pursuant to a judicial warrant "authorizing the carefully limited use of electronic surveillance" (389 U.S. at 356). Thus, *Katz*, while discarding the criterion of trespass, held only warrantless monitoring, not all monitoring, to be constitutionally infirm.

Decisions such as *Katz* of course reflect the fact that there are inevitable developments in the constitutional rules governing the investigation and adjudication of criminality. It is not, however, a logical or necessary corollary to the announcement of each new stage in that development that all past criminal convictions, which had been properly obtained under the law as it previously stood, should be invalidated. Where a new rule does not bear on the integrity of the guilt-determining process as to particular defendants, but is designed essentially to regulate police behavior in the interest of preserving rights of the citizenry as a whole, retroactive application of the new rule is not warranted. Extending many new rules of criminal

procedure to past cases would simply penalize society—by the release of justly convicted criminals—for the failure of law-enforcement officers and lower courts to anticipate the nature and scope of future changes in constitutional law—a function uniquely reserved to this Court. Retroactive application would seem particularly inappropriate where there would almost certainly have been compliance with the new rule had it then existed and been known.

Three years ago, in *Linkletter v. Walker*, 381 U.S. 618, this Court for the first time undertook to analyze in a plenary fashion the various considerations bearing upon the propriety of prospective or retrospective application of constitutional rules of criminal procedure. After discussing various cases dealing with statutory changes or decisional overturning of established common-law rules, the Court there concluded that “the accepted rule today is that in appropriate cases the Court may in the interest of justice make [a new] rule prospective” (381 U.S. at 628). It then noted that “there seems to be no impediment—constitutional or philosophical—to the use of the same rule in the constitutional area where the exigencies of the situation require such an application” (*ibid.*). Acknowledging that previously and “without discussion,” new constitutional rules had been applied retroactively,<sup>7</sup> the Court rejected the view that the “method

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<sup>7</sup> Prior to *Linkletter*, as noted in *Johnson v. New Jersey*, 384 U.S. 719, 733, the Court had “applied new judicial standards in a wholly prospective manner,” citing *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, and *James v. United States*, 366 U.S. 213. Moreover, the Court had

of resolving those prior cases demonstrates that an absolute rule of retroaction prevails in the area of constitutional adjudication" (381 U.S. at 628-629). Instead, the Court stated its belief "that the Constitution neither prohibits nor requires retrospective effect" (381 U.S. at 629). Continuing, the Court struck the note it was to follow consistently thereafter (381 U.S. at 629):

Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by

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previously considered the question of retroactive application of new rules in a variety of non-criminal areas. See, e.g., *Marine National Bank v. Kalt-Zimmers Mfg. Co.*, 293 U.S. 357 (negotiable instruments); *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (freight rates); *Fleming v. Fleming*, 264 U.S. 29 (contracts); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (deeds); *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. 416 (contracts). See generally *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371. Individual members of the Court had also suggested consideration of the question in the criminal procedure area. See, e.g., *Pickelheimer v. Wainwright*, 375 U.S. 2, 3 (dissenting opinion); *Griffin v. Illinois*, 351 U.S. 12, 20 (concurring opinion).

The cases to which the *Linkletter* opinion referred concerned rules regarding the assessment of the voluntariness of a defendant's confession, the rule that counsel must be appointed to represent an indigent charged with a felony, and the rule that a transcript of the trial must be furnished an indigent for use on appeal (see 381 U.S. at 628-629, n. 13). All of these rules, whether or not developed expressly for such purposes, serve directly to reduce the possibility of an unreliable determination of guilt, or the affirmance of such an unreliable determination. See *Johnson v. New Jersey*, 384 U.S. 719, 727-728; *Tehan v. Shott*, 382 U.S. 406, 416.

looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.

Moreover, the *Linkletter* opinion significantly noted that the prior rule must be considered as "an operative fact and may have consequences which cannot justly be ignored," and that "'public policy in the light of the nature both of the \* \* \* [prior-rule] and of its previous application' must be given its proper weight" (381 U.S. at 636, quoting from *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374). Accordingly, the opinion concluded, in deciding whether a new constitutional rule of criminal procedure should be given retroactive or only prospective effect, the particular situation presented must be asayed in three respects—"the purpose of the [new] rule; the reliance placed upon the [prior] doctrine; and the effect on the administration of justice of a retrospective application of [the prior doctrine]" (381 U.S. at 636).

Since *Linkletter*, the Court has, in four subsequent cases, reiterated that a decision announcing a new constitutional rule of criminal procedure may be applied either retrospectively or prospectively, and each of these cases affirmed the necessity of evaluating the situation presented in the above respects. *Tehan v. Shott*, 382 U.S. 406, 413; *Johnson v. New Jersey*, 384 U.S. 719, 727; *Stovall v. Denno*, 388 U.S. 293, 297; *DeStefano v. Woods*, No. 559, 1967 Term (decided on June 17, 1968, together with *Carcerano v. Gladden*,



No. 941, 1967 Term).<sup>8</sup> In each of these cases, as in *Linkletter*, this Court concluded that, on balance, a general retroactive application of the particular new rule involved was not warranted. In the instant case, applying the same decisional criteria, it is apparent that the same conclusion is justified.

This conclusion is fully supported by this Court's decision in *Roberts v. Russell*, No. 920 Misc., 1967 Term, where *Bruton v. United States*, No. 705, 1967 Term, decided May 20, 1968, was held to be retroactive in effect. Notably, the Court based its holding on the express ground that the issue involved in

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<sup>8</sup> Petitioners attack the jurisprudential underpinnings of *Linkletter*, and the subsequent decisions holding new constitutional rules non-retroactive, on the ground that John Austin, whose general philosophy was briefly referred to in the *Linkletter* opinion (381 U.S. at 623-624), might not have acceded to the theoretical propriety of a prospective application of judicial decisions interpreting the Constitution, as opposed to the common law, in light of the particular governmental structure existing in this country (Pet. Br. 57-65). While we do not agree with petitioners' analysis, it seems unnecessary to debate the point. Mr. Justice Cardozo once noted, in discussing a possible line of division between the kinds of cases which would be given retrospective application and those which would not (Cardozo, *The Nature of the Judicial Process*, pp. 148-149 (1921)):

\* \* \* Where the line of division will some day be located I will make no attempt to say. I feel assured, however, that its location, wherever it shall be, will be governed, not by metaphysical conceptions of the nature of judge-made law, nor by the fetish of some implacable tenet, such as that of the division of governmental powers, but by considerations of convenience, of utility, and of the deepest sentiments of justice.

It is clearly with reference to these considerations that the line has now been drawn in this Court's recent decisions.



*Bruton* went to the inherent fairness and reliability of the guilt-determining process (slip op. pp. 2-3). Moreover, the *Roberts* opinion quotes extensively from *Linkletter*, *Johnson* and *Stovall* in distinguishing from those cases a situation in which the integrity of the trial is at stake. It is of course apparent that the *Katz* rule, involved in the instant case, does not cast doubt upon the fairness or integrity of trials conducted under the prior law.

1. *The purpose to be served by the Katz requirement will not be furthered by a retroactive application.* Realistically, the central justification for overturning otherwise proper prior convictions by a retroactive application of a new rule of criminal procedure is that the underlying purpose of the particular rule would thereby be furthered. If, however, the purpose of the rule would not thus be served, there is no sound reason for giving the rule retroactive effect. Hence, in each of the recent cases discussing the factors to be assessed in determining the possible retroactive reach of a new rule, the purpose to be served by the rule is listed in the Court's opinion as the first of the pertinent considerations. Moreover, the Court noted in *Linkletter* not only that it must look to the history and purpose of the new rule in question, and determine whether or not retrospective application will further its operation, but specifically stated that such an approach "is particularly correct with reference to the Fourth Amendment's prohibitions as to unreasonable searches and seizures" (381 U.S. at 629). The retroactivity issue in the instant case, of course, is one which arises in a Fourth Amendment context.

The purpose to be served by the rule announced in *Katz* is to prevent law-enforcement agents from electronically monitoring conversations which a suspect seeks to preserve as private and reasonably assumes to be private, without first securing judicial sanction for such monitoring. Retroactive application of such a rule, however, cannot alter the fact that such non-trespassory monitoring by law-enforcement officers, in reliance on this Court's decision in *Goldman v. United States*, 316 U.S. 129, and *Silverman v. United States*, 365 U.S. 505, has already in fact occurred, and that the "ruptured privacy of the \* \* \* [subjects] cannot be restored" (*Linkletter v. Walker*, 381 U.S. at 637). Moreover, unlike the situation in *Linkletter*, the sort of individual privacy involved in this case—freedom from non-trespassory overhearing of conversations—was not, prior to *Katz*, even recognized as a matter of constitutional concern.\* Those whose incriminating conversations were overheard without a trespass had no vested constitutional assurance that their words could not be reached by law-enforcement agents acting without a warrant. Although they were victims of a successful surveillance, they suffered no legally cognizable loss. Certainly "at this late date" no purpose

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\* As this Court pointed out in *Johnson v. New Jersey*, 384 U.S. 719, 731, even prior to *Mapp v. Ohio*, 367 U.S. 643, which *Linkletter* held inapplicable to convictions which had become final prior to the date of the *Mapp* decision, "the States at least knew that they were constitutionally forbidden from engaging in unreasonable searches and seizures under *Wolf v. Colorado*, 338 U.S. 25 (1949). In this regard, see the similar reference to *Linkletter* in *Tehan v. Shott*, 382 U.S. 406, 417.

will be served "by the wholesale release of the guilty victims" (*Linkletter v. Walker*, 381 U.S. at 637).

Thus, it has been the deterrent aspect of the newly announced rules that the Court has repeatedly emphasized in gauging the propriety of retroactive or prospective application.<sup>10</sup> Quite plainly, that aspect of *Katz* requiring the exclusion of evidence obtained by electronic monitoring without a warrant "is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217; *Linkletter v. Walker*, 381 U.S. at 633, 635-637; see *Stovall v. Denno*, 388 U.S. at 297. Here, as in *Linkletter*, it cannot be said "that this [deterrent] purpose would be advanced by making the rule retrospective" (381 U.S. at 637). Obviously, it

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<sup>10</sup> The opinion in *Linkletter* noted that the purpose of *Mapp v. Ohio* was "to deter the lawless action of the police and to effectively enforce the Fourth Amendment" (381 U.S. at 637). In *Tehan* it was pointed out that no single purpose could be attributed to *Griffin v. California* (382 U.S. at 413-414), but in *Johnson* the Court observed that in reaching the *Tehan* result it took into account that "the basic purpose of the [no-comment] rule was to discourage courts from penalizing use of the privilege against self-incrimination" (384 U.S. at 727). Even in *Johnson*, where deterrence was not the principal objective of the new rule, the Court noted that "the prime purpose of [*Miranda*] is to guarantee full effectuation of the privilege against self-incrimination" (384 U.S. at 729). Finally, in *Stovall* the Court stated that *United States v. Wade* and *Gilbert v. California* "fashion exclusionary rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel" (388 U.S. at 297).

is only through the prospective application of the *Katz* rule that its deterrent effect can be achieved.

More important, and indeed more basic for present purposes, is the fact that the *Katz* rule is not designed to avoid erroneous determinations of guilt, nor does or can it to any significant degree have that effect. See *Stovall v. Denno*, 388 U.S. at 297-298; *Johnson v. New Jersey*, 384 U.S. at 727-728; *Tehan v. Shott*, 382 U.S. at 415-416; *Linkletter v. Walker*, 381 U.S. at 639; Note, 16 J. Pub. Law 193, 195-202 (1967). Evidence obtained by electronic monitoring without a warrant certainly is not suspect as unreliable. Indeed, such evidence, if properly authenticated, is of the highest probative value. A rule requiring its exclusion is thus directed solely at discouraging law-enforcement officers from undertaking such monitoring of presumably private conversations without first disclosing their justification to a magistrate, and not in any measure toward "enhancing the reliability of the fact-finding process" (*Stovall v. Denno*, 388 U.S. at 298), avoiding the "danger of convicting the innocent" (*Johnson v. New Jersey*, 384 U.S. at 728), or averting "a serious risk that the issue of guilt or innocence may not have been reliably determined" (*Roberts v. Russell*, No. 920 Misc., 1967 Term, decided June 10, 1968, slip. op., p. 3). Consequently, the argument against retroactive application is in this respect substantially more persuasive here than in the several recent cases where newly announced rules did, to a certain degree, involve "the integrity of the truth-determining process at trial" (*Stovall v. Denno*, 388 U.S. at 298), and yet, on balance, were found not to warrant a general



retroactive application.<sup>11</sup> The rule announced in *Griffin v. California*, 380 U.S. 609, was denied such general retroactive application in *Tehan v. Shott*, 382 U.S. 406,<sup>12</sup> "despite the fact that comment on the failure to testify may sometimes mislead the jury concerning the reasons why the defendant has refused to take the witness stand" (*Johnson v. New Jersey*, 384 U.S. at 729). And the rules announced in *Escobedo v. Illinois*, 378 U.S. 478, and *Miranda v. Arizona*, 384 U.S. 436, were denied retroactive application in *Johnson v. New Jersey*, 384 U.S. 719, although a confession of an unrepresented or unwarned suspect may under some circumstances be less reliable than that of an adequately represented individual fully apprised of his constitutional rights. Likewise, the rule announced in *United States v. Wade*, 388 U.S. 218, and *Gilbert v. California*, 388 U.S. 263, was denied retroactive application in *Stovall v. Denno*, 388 U.S. 293, even though presence of defense counsel at a lineup may permit a more meaningful examination at trial as to the basis and accuracy of a witness's courtroom

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<sup>11</sup> In such situations, as the Court noted in *Johnson v. New Jersey*, 384 U.S. at 728-729, "whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree" and involves "a question of probabilities" as to which the extent of the protection provided by other established constitutional safeguards is most relevant. To like effect, see *Stovall v. Denno*, 388 U.S. at 298, and *DeStefano v. Woods*, No. 559, 1967 Term, decided June 17, 1968, slip op., p. 3.

<sup>12</sup> When *Tehan* was decided, however, *Griffin* had already been applied, without discussion, to cases still on direct appeal at the time it had been announced, as had *Mapp* prior to *Linkletter* (see *infra*, pp. 44-46).



identification. Finally, the rules announced in *Duncan v. Louisiana*, No. 410, 1967 Term, and *Bloom v. Illinois*, No. 52, 1967 Term, both decided on May 20, 1968, were held to have "only prospective application" in *DeStefano v. Woods*, No. 559, 1967 Term, decided June 17, 1967, although the Court concluded that "the right to jury trial generally tends to prevent arbitrariness and repression" and that contempt cases "would be more fairly tried if a jury determined guilt" (Slip op., pp. 3, 4).

In each of the above instances, the new rule, unlike those announced in *Mapp* and in *Katz*, possessed at least some potential for enhancing the reliability of the fact-finding process. Nevertheless, this consideration was thought to be outweighed by previous governmental reliance upon the former standards and by the potentially detrimental effect of retroactivity upon the administration of justice. In the present situation, "the reliability and relevancy" of evidence obtained by non-trespassory electronic surveillance is clear (see *Linkletter v. Walker*, 381 U.S. at 639).<sup>13</sup> There

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<sup>13</sup> Petitioners claim that the "integrity of the fact-finding process" is in fact involved in this case because of asserted acoustical and translation problems with the tapes of the recorded conversations (Pet. Br. 76-77). In so asserting, however, petitioners are plainly confusing a general rule regarding admissibility of a class of evidence with the adequacy of the foundation and the probative value of specific items of evidence in this particular case. (See *infra*, pp. 70-73.) Their contention in this respect thus lacks pertinence with regard to the general question here presented—the retroactivity or non-retroactivity of the *Katz* rule. Moreover, their narrower claim, as it relates to the adequacy of the particular tapes, was considered and properly rejected by both courts below.

is thus no need to weigh the value of the new rule in improving the integrity of the guilt-determining process against other considerations, such as justifiable reliance on prior authority or the number of cases affected. Simply stated, there is no sound jurisprudential purpose to be served by retrospective application of the *Katz* rule. Nevertheless, if reliance and impact are considered, these factors also weigh heavily against the adoption of such an approach.

2. *Law-enforcement officers have justifiably relied on previous judicial decisions holding that no warrant was necessary for non-trespassory electronic surveillance.* It is clear beyond cavil that prior decisions in Fourth Amendment cases had established a body of legal authority, regarding the propriety of non-trespassory electronic monitoring of private conversations, upon which law-enforcement officers were fairly entitled to rely. The distinction between electronic surveillance which does not involve a physical intrusion into a constitutionally protected area, and electronic surveillance which does involve a trespass, was explicitly drawn by this Court in *Goldman v. United States*, 316 U.S. 129, and *Silverman v. United States*, 365 U.S. 505. As noted in *Lopez v. United States*, 373 U.S. 427, 438-439:

The Court has in the past sustained instances of "electronic eavesdropping" against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear. See, e.g., *Olmstead v. United States*, 277 U.S. 438; *Goldman v. United States*,

316 U.S. 129. It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. *Silverman v. United States*, *supra*. \* \* \*

As recently as this Court's decision in *Berger v. New York*, 388 U.S. 41, decided only six months prior to *Katz*, the Court gave explicit recognition to this established doctrine. There, the Court condemned the New York eavesdropping statute for allowing, because of its overbreadth, "a trespassory intrusion into a constitutionally protected area" (*id.* at 44) and "a trespassory invasion of the home or office, by general warrant, contrary to the command of the Fourth Amendment" (*id.* at 64). Indeed, the Court in *Berger* noted that it had "in the past, under specific conditions and circumstances, sustained the use of eavesdropping devices" (*id.* at 63), citing *Goldman, Lopez, On Lee v. United States*, 343 U.S. 747, and *Osborn v. United States*, 385 U.S. 323 (see also 388 U.S. at 50-53, discussing these cases). Similarly, the lower federal courts have been uniform in applying the trespass/non-trespass distinction which these cases delineated (see, *infra*, pp. 51-52). Petitioners cite no pre-*Katz* case, federal or state, which failed to adhere to that distinction where an electronic monitoring was involved.

It is thus apparent that law-enforcement agents in the past, when faced with the necessity of either using an electronic monitoring device or allowing a criminal investigation to be effectively thwarted, have relied upon the distinction drawn by the decided cases and used a non-trespassory device. No investigator, given a free choice, would elect to use as crude a moni-

toring means as an ordinary microphone placed against a crack under a door—the method used in the present case. A microphone secreted in the subject's room, or a spike microphone inserted into the wall so as to touch against the opposite surface, would provide far greater clarity and sonic fidelity.<sup>14</sup> Yet to comply with existing law, the simple, non-trespassory method has been employed, and had, until *Katz*, consistently received the expected judicial approval. Indeed, only one week prior to the agents' installation of the equipment in this case, this Court denied a petition for a writ of certiorari to review a Second Circuit decision affirming, on the basis of *Goldman*, the propriety of a virtually identical installation by the same narcotics agents. *United States v. Pardo-Bolland*, 348 F.2d 316, certiorari denied, 382 U.S. 944. In that case, agent Durham had taped a small, ordinary microphone against the clearance space beneath a door separating two hotel rooms, just as he later did in this case (No. 521, 1965 Term, II R. 4a-5a, 10a-11a).<sup>15</sup> In each instance, care was taken that there

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<sup>14</sup> The lack of a high degree of clarity in the agents' tapes in this case, which forms the basis of one of petitioner's complaints (see Pet. Br. 122-134; 158-161), was a direct result of the agents' careful compliance with existing law. Nonetheless, the tapes were sufficiently intelligible (see *infra*, p. 70).

<sup>15</sup> Compare the photograph of the microphone installation in that case (Pet. App. C., No. 521, 1965 Term) with that in this case (Gov. Exhs. 3, 4). In *Pardo-Bolland* a microphone was also placed against a keyhole in the common door. At a second hotel, an installation was made with a microphone placed against a small opening in the common wall through which a telephone cable entered the two rooms. Both installations were found non-trespassory, and hence permissible. 348 F.2d at 321.



was no penetration into or under the door; the microphone was simply placed so as to pick up the sounds coming under the door, just as they might be heard by an agent with his ear next to the clearance space. The agents certainly had no cause to anticipate that the same type of installation found constitutionally permissible in the *Pardo-Bolland* case would not be held permissible when employed such a short time later. Although the distinction based upon trespass may have been wisely abandoned, law-enforcement officers should be able to act upon the guidance of a clear line of Federal court decisions—the existence of which must be recognized as an “operative fact” (*Linkletter v. Walker*, 381 U.S. at 636; *Tehan v. Shott*, 382 U.S. at 413)—delineating specific investigative conduct as permissible. Indeed, how government agents can, as a practical matter, do otherwise is difficult to conceive. Law-enforcement officers cannot reasonably be expected to foresee and anticipate changes in constitutional rules, much less predict when such changes will occur.

Petitioners contend, nevertheless, that in 1965 the coming of the *Katz* holding was foreshadowed by recent developments in this area of the law, and that the agents here thus had no justification for proceeding in their investigation under the assumption that the *Goldman-Silverman* distinction had continuing validity (Pet. Br. 69-70).<sup>16</sup> Although philosophical grounds

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<sup>16</sup> Petitioners further argue that electronic surveillance by law-enforcement officers is inherently “immoral” and a “maximally abhorrent method” of conducting a search (see, e.g.,



for finding the distinction outmoded might have been apparent to some lawyers in 1965, it was not then clear by any means that this Court would in fact abandon the concept. The prior holdings of this Court certainly gave no clear forewarnings that the trespass distinction would no longer be followed. Cf. *Johnson v. New Jersey*, 384 U.S. at 734.<sup>17</sup> It simply cannot

Pet. Br. 41, 42). At best, these sentiments have little to do with a correct interpretation of the Fourth Amendment, or with the precise question here at issue: whether *Katz* should be applied retroactively. It is sufficient to say that petitioners' expressed view had never been accepted by this Court, and was only recently repudiated by Congress. Nor has it been given any significant legislative acceptance by the States.

<sup>17</sup> That aspect of *Olmstead v. United States*, 277 U.S. 438, which found intangible speech not within the purview of the Fourth Amendment, was admittedly not supported by later cases. *Wong Sun v. United States*, 371 U.S. 471, 485-486; *Lanza v. New York*, 370 U.S. 139, 142; *Silverman v. United States*, 365 U.S. 505; *Irvine v. California*, 347 U.S. 128. The trespass distinction, however, continued to be emphasized. Although *Silverman* noted that the Court would not be governed by "technical" considerations of "local property law" or the "ancient niceties of tort or real property law" (365 U.S. at 511), it emphasized that the absence of any "physical invasion" has been a "vital factor" in the Court's decisions in the area (365 U.S. at 510), and then expressly declined to re-examine *Goldman* (365 U.S. at 512), despite the fact that such re-examination "was strenuously urged upon the Court by the petitioners' counsel" (*Katz v. United States*, 389 U.S. 347, 370 (dissenting opinion)). Moreover, two Justices concurred in the *Silverman* holding "[i]n view of the determination by the majority that the unauthorized physical penetration into petitioners' premises constituted sufficient trespass to remove this case from the coverage of earlier decisions" (365 U.S. at 513). *Clinton v. Virginia*, 377 U.S. 158, a post-*Mapp* decision applying *Silverman* to the States in a terse,

be said that the *Katz* holding was "clearly foreshadowed" or "fully anticipated" by prior cases (*id.* at 731, 734).

With the general recognition that some means of electronic surveillance—at least in some cases—is one of "the legitimate needs of law enforcement" (see *Katz v. United States*, 389 U.S. at 356; *Lopez v. United States*, 373 U.S. at 464 (dissenting opinion)), it appeared either that the trespass distinction in some form would have to be maintained, or that a warrant procedure would have to be sanctioned. In view of the hurdles facing the latter possibility—including the requirement of specificity in describing the matter to be seized, the then-extant "mere evidence" rule,<sup>18</sup> and the necessity of notice in executing the warrant—the warrant procedure did not appear with any certainty to be the more likely alternative (generally *Berger v. New York*, 388 U.S. 41). As late as 1967, in fact, counsel for petitioners herein, who was also counsel for *Berger*, argued as his principal contention in the *Berger* case that "no conceivable system of judicially permissive trespassory or other [non-trespassory] electronic eavesdropping \* \* \* can be constitutional", and developed the argument for some 50 pages.<sup>19</sup>

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*per curiam* opinion, does not serve to advance petitioners' argument.

<sup>18</sup> *Warden v. Hayden*, 387 U.S. 294, which abandoned the "mere evidence" rule, was not decided until May 29, 1967.

<sup>19</sup> Counsel therein noted, after reviewing the authorities, that "the interesting conclusion is that no one has yet been

(*Berger v. United States*, No. 615, 1966 Term, Pet. Br. 15-64).

In any event, it seems obvious that, for eminently practical reasons, law-enforcement officers must perform their duties within the confines of the law as it stands under the decided cases, not as it might eventually develop. Their actions cannot await judicial resolution of the disparate views of legal theoreticians. They must act upon the exigencies facing them. Their failure to use a currently approved and necessary means of combatting substantial and far-reaching criminal activity because some members in the legal profession question its future viability, would be as much a breach of their public duty as their use of a currently prohibited means on the ground that some lawyers feel its future approval likely. The agents in this case, in conducting the Waldorf-Astoria monitoring, were carefully and conscientiously operating within the bounds of existing law, while attempting to thwart a massive importation of pure heroin before it could be disseminated in this country to do its incalculable harm.<sup>20</sup> Their failure then to second-guess the existing cases permitting non-trespassory surveillance, and thus to take the then-unnecessary step of

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able to propose any means of overcoming the two critical constitutional difficulties"—the "inevitability" that electronic surveillance involves a "general search" and a search for "mere evidence". (*id.* at 44).

<sup>20</sup> It is this aspect of the instant case that makes so incongruous petitioners' characterization of themselves as "victim[s]" and the government agents as "wrongdoer[s]" (Pet. Br. 79).

seeking some sort of judicial warrant<sup>21</sup> authorizing electronic monitoring of the hotel room (presumably by trespassory as well as non-trespassory means), cannot properly be faulted.

Moreover, since the agents' reliance in this case was not simply upon decisions concerning the admissibility of the evidence obtained, but upon decisions construing the lawfulness of the investigation itself, the situation presented here is far more compelling than that which faced this Court in *Linkletter*. See *Johnson v. New Jersey*, 384 U.S. at 731; *Tehan v. Shott*, 382 U.S. at 417. There, the conduct of the state agents (in first searching the defendant's locked dwelling and office, without a warrant, after he had been booked and placed in jail) was known to be constitutionally forbidden at the time it occurred, and the only question was whether the exclusionary rule announced in *Mapp v. Ohio*, 367 U.S. 643, would be given retroactive effect. Although the reliance of the state authorities was not upon the propriety of the means of obtaining evidence, but solely upon the pre-*Mapp* rule that evidence unlawfully obtained was nonetheless admissible in state court trials, retrospective effect was still denied. In the instant case, by way of contrast,

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<sup>21</sup> Petitioners note (Pet. Br. 68) that the record does not show that the agents had probable cause for the surveillance. The government, however, was never put to its proof on this point. It may fairly be presumed that the surveillance was undertaken on something more than an extraordinarily fortuitous guess. Thus, a warrant might well have been obtainable, consistent with the strictures laid down in *Katz*, had the law at that point required this to be done.



the agents' conduct was in no respect an intentional evasion of a known constitutional standard. Nor, it should be noted, did their activities constitute a willful breach of state or local law.<sup>22</sup>

In each of its recent decisions holding new rules of criminal procedure non-retroactive, the Court has emphasized the significance of the fact of reliance by law-enforcement agents on the previously existing law. In *Linkletter*, the Court repeatedly noted that, prior to *Mapp*, "the States relied on *Wolf* and followed its command," and pointed out that "[a]gain and again this Court refused to reconsider *Wolf* and gave its implicit approval to hundreds of cases in their ap-

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<sup>22</sup> Petitioners argue that the electronic surveillance here conducted by the narcotics agents was in violation of New York statutes (Pet. Br. 45, 85-86). The district court, however, at the conclusion of the hearing on the motions to suppress, expressly found that the New York statutes in question did not apply to federal law enforcement agents (R. 3778-3780). That finding was not asserted as error by any of petitioners in the court of appeals, and hence, the question as an independent issue is not now properly before this Court. See *Lawn v. United States*, 355 U.S. 339, 362-363 n. 16. To the extent that the matter bears upon the good-faith reliance of the agents upon the lawfulness of their monitoring, it should be noted that this same issue, involving the same agents, had been discussed and decided in the agents' favor in the *Pardo-Bolland* case over four months prior to the Waldorf-Astoria surveillance. See 348 F.2d at 321-323). There, the court of appeals concluded, for sound reasons, that "[t]he New York statutes involved here \* \* \* do not appear to have been intended to apply to federal law enforcement officers"; "the policing of the activities of federal officers was intended to be left to the federal statute and the supervision of federal courts, which so far have drawn the line at the point of physical trespass" (*id.* at 323).



plication of its rule" (381 U.S. at 637). In *Tehan* the Court extensively traced the history of the rule regarding comment on a defendant's failure to testify, prior to *Griffin*, and noted that "[t]here can be no doubt of the States' reliance upon the *Twining* rule for more than half a century, nor can it be doubted that they relied upon that constitutional doctrine in utmost good faith" (382 U.S. at 417). Again in *Johnson*, the reliance factor was accorded considerable weight. Indeed, the Court explicitly stated that "[l]aw enforcement agencies fairly relied on \* \* \* prior cases, no longer binding, in obtaining incriminating statements during the intervening years preceding *Escobedo* and *Miranda*" (384 U.S. at 731). Moreover, the Court in *Johnson* determined that *Escobedo* and *Miranda* would be given "[p]rospective application only to trials begun after the [new] standards were announced" since law-enforcement authorities "have not been apprised heretofore of the specific safeguards which are now obligatory" (*id.* at 732). And in *Stovall* the Court made reference to the weight of "the prior justified reliance upon the old standard" (388 U.S. at 298), and noted that "[l]aw enforcement authorities fairly relied on [the] virtually unanimous weight of authority, now no longer valid, in conducting pretrial confrontations in the absence of counsel" (*id.* at 300). Finally, in *DeStefano*, the Court pointed out that "States undoubtedly relied in good faith upon the past opinions of this Court to the effect that the Sixth Amendment right to jury trial was not applicable to the States" (slip op., p. 3), and further noted reliance on "the tradition of nonjury trials for

contempts," since "more firmly established," was even "more justified" (*id.* at p. 4). Thus it is clear at all events that the reliance factor has played a significant role in this Court's shaping of rules for non-retroactive application of new constitutional standards. Coupled with a consideration of the purpose to be served by the *Katz* requirement, the element of justifiable reliance argues persuasively for that decision's non-retroactivity.

3. A general retroactive application of the *Katz* decision would have an adverse effect upon the administration of justice. As delineated in this Court's opinion in *Stovall*, the third and final factor to be considered is "the effect on the administration of justice of a retroactive application of the new standards" (388 U.S. at 297). We believe that the retroactive application of the *Katz* rule would have marked effect upon the administration of justice, although the impact would not, in volume, be of the same dimension as that involved in the *Stovall* and *Johnson* situations. Instead of a wholesale release of thousands of convicted felons, only a relatively small number would probably be affected, since electronic surveillance has played a part in a limited number of federal cases.<sup>23</sup>

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<sup>23</sup> The difficulty in obtaining evidence by the more common investigation means against major figures in the organized crime field, and the corresponding importance of electronic surveillance in such cases, has been emphasized by the President's Commission on Law Enforcement and Administration of Justice in its report entitled "The Challenge of Crime in a Free Society", pp. 198-199, 201-203, and in the Commission's supplemental "Task Force Report: Organized Crime", App. A, pp. 17-19, App. C, pp. 80, 91-95, 105-106 (1967). See

It should be noted, however, that the matters involved in many of those cases give them a significance to the effective administration of criminal justice in the federal courts beyond that which their number alone might reflect.<sup>24</sup> While occasionally such cases involve a rather insignificant offense (as did *Katz*), most, like the present one, are of far-reaching importance. The quantity of unadulterated heroin seized in this case exceeded 200 pounds—acknowledged by petitioners to be the largest cache ever captured in this country

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*Berger v. New York*, 388 U.S. 41, 95, 113-129 (dissenting opinions). With particular regard to such a need in investigating narcotics importation, see Investigations of the Senate Committee on Government Operations, *Organized Crime and Illegal Traffic in Narcotics*, S. Rep. No. 72, 89th Cong., 1st Sess., pp. 101, 126 (1965). While the use of informants might appear to be a reasonably available alternative to the use of electronic surveillance in the organized crime field, the practical difficulties involved in recruiting, retaining, and using informants are noted in the above report of the President's Commission (p. 198). Moreover, the risk to informants is unconscionably high; between 1961 and 1965, 25 of the government's informants in the organized crime field were murdered. Testimony of former Attorney General Katzenbach, *Hearings Before the Senate Subcommittee on Administrative Practice and Procedure of the Committee of the Judiciary on Invasions of Privacy*, 89th Cong., 1st Sess., pt. 3, p. 1158 (1965).

<sup>24</sup> It is impossible to ascertain any accurate figures relating to the amount of non-trespassory electronic surveillance engaged in by State or local officers, and involved in State, as distinguished from federal, criminal litigation. It can be assumed, however, that the amount of such activity has not been insubstantial. Since the *Katz* rule, if applied retroactively, would affect such State convictions and trials as well as those in federal courts, this additional factor should properly be taken into account in assessing the potential affect of holding *Katz* retroactive.

(Pet. 3). Its value, as noted by the court below, was placed as high as \$100,000,000 (Pet. App. 2a)—a sum exceeding the gross national product of some member countries of the United Nations (see International Bank for Reconstruction and Development, *World Bank Atlas* (1967 ed.); Steinberg, *The Statesman's Yearbook* 1967-1968, pp. 9-10 (1967)). Yet, the transaction was described by petitioner Dioguardi as a "once-a-year deal" (R. 1144). In the *Pardo-Bolland* case (see *supra*, pp. 32-33), approximately 136 pounds of heroin were involved (see 348 F.2d at 318), which, at corresponding rates, would be worth about \$65,000,000. The potential long-term effect upon the administration of justice which would be occasioned by reversals in such major cases, is as weighty a factor as the immediate effect of wholesale reversals in a larger number of more routine cases.

Thus, it seems wholly appropriate to consider the qualitative as well as the quantitative impact of a holding that *Katz* is retroactive.<sup>25</sup> The language of the Court in *Linkletter* bears repeating, particularly since that case, like the present one, involves the retroactivity or non-retroactivity of a rule adopted in the Fourth Amendment context (381 U.S. at 637-638):

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<sup>25</sup> In *Tehan*, it should be noted, only six States had allowed comment on a defendant's failure to testify, yet the Court concluded that "[a] retrospective application of *Griffin v. California* would create stresses upon the administration of justice more concentrated but fully as great as would have been created by a retrospective application of *Mapp*" (382 U.S. at 418). Indeed, in *Stovall* it was noted that the effect of holding *Griffin* retroactive in *Tehan* would have been "insignificant compared to the impact to be expected from retroactivity of the *Wade* and *Gilbert* rules" (388 U.S. at 300).



Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of *Mapp* retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.

This theme was amplified in the post-*Linkletter* decisions holding new constitutional rules non-retroactive. Thus, in *Tehan* the Court pointedly stated that "[t]o require all of those [six] States now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of their criminal law so devastating as to need no elaboration" (382 U.S. at 419). In *Johnson* the Court noted that "retroactive application of *Escobedo* and *Miranda* would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards" (384 U.S. at 731). Similar views were expressed in the Court's opinion in *Stovall* (see 388 U.S. at 300-301), where the Court regarded "the factors of reliance and burden on the administration of justice as entitled to \* \* \* overriding significance" (*id.* at 300). Finally, in *DeStefano* the Court stated that the effect on the administration



of justice of holding *Duncan* and *Bloom* retroactive would be "significant" and "substantial" (Slip op., pp. 3, 4). Against this decisional background, it seems apparent that the impact of holding *Katz* retroactive is an important and added factor militating against that result, and that the difference in the situations presented is at most one of degree, not kind.

*B. Since there is no reason for a general retroactive application of the Katz requirement, there is similarly no reason to apply that requirement to cases which were then pending on appeal.*

Where, as argued above, there is no reason for a retroactive application at all, there is likewise no persuasive reason to differentiate between past cases in which the convictions were final on the date of the new decision, and past cases in which appellate review was then still in progress. As the Court succinctly stated in *DeStefano*, its most recent holding on the subject, there is "no basis for a distinction between convictions that have become final and cases at various stages of trial and appeal" (slip op., p. 4 n. 2).

In *Linkletter*, the first of this Court's recent cases analyzing the retroactivity issue, it was noted that the *Mapp* decision had already been applied to cases pending on direct review at the time it was rendered,<sup>26</sup>

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<sup>26</sup> In this particular respect, the fact that *Mapp* involved the Fourth Amendment, as did *Katz*, is not determinative. As this Court has emphasized in discussing retroactivity generally (*Stovall v. Denno*, 388 U.S. at 297; *Johnson v. New Jersey*, 384 U.S. at 728):

[T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional

and therefore that the only concern, as a matter of sheer practicality, was whether the decision was to be applied to cases which were then final (381 U.S. at 622).<sup>27</sup> Similarly, in *Tehan* it was passingly noted that the Griffin decision had theretofore been applied to cases which had been pending on direct review when *Griffin* was decided (382 U.S. at 409 n. 3). In *Johnson*, however, this Court for the first time was presented with an open issue as to whether a ruling—that in *Escobedo* and *Miranda*—should be applied prospectively. After determining that, as a general

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rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved.

<sup>27</sup> While *Linkletter*, in its general, introductory discussion of retroactivity, had stated that "it appears \* \* \* that a change in law will be given effect while a case is on direct review" (381 U.S. at 627), the cases cited in support involved civil matters clearly distinguishable in nature from the problems existing in *Johnson*, *Stovall*, and the instant case. In *United States v. The Schooner Peggy*, 1 Cranch 103, an intervening treaty by its own terms applied to ship condemnation cases not yet final. In *Carpenter v. Wabash Ry. Co.*, 309 U.S. 23, an intervening statute by its own terms applied to railroad receivership cases pending in any federal court. In *Dinsmore v. Southern Express Co.*, 183 U.S. 115, and in *Crozier v. Krupp*, 224 U.S. 290, intervening statutes mooted the necessity for the requested injunctive reliefs. In *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, an intervening decision extended employers' liability under negligence law—an area of law in which reliance on prior holdings plays no part in precipitating the action or inaction in question. In any event, the *Johnson*, *Stovall*, and *DeStefano* decisions have settled the issue as it applies to intervening court decisions changing constitutional rules of criminal procedure.

matter, those cases, like *Mapp* and *Griffin*, "should not be applied retroactively," the Court in *Johnson* posed the further question "whether *Escobedo* and *Miranda* shall affect cases still on direct appeal when they were decided or whether their application shall commence with trials begun after the decisions were announced" (384 U.S. at 732). It was next observed that the holdings in *Linkletter* and *Tehan* "were necessarily limited to convictions which had become final by the time *Mapp* and *Griffin* were rendered," because of the earlier and unconsidered applications of those decisions to cases still on direct appeal (*ibid.*). It was emphasized that those prior applications had been made "without discussion" and before the general problem had been actively focused upon and dealt with by the Court (*ibid.*; see Schaeffer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. Rev. 631, 644-646 (1967).<sup>28</sup> Continuing, the Court stated (384 U.S. at 732-733):

All of the reasons set forth above for making *Escobedo* and *Miranda* nonretroactive suggest that these decisions should apply only to trials begun after the decisions were announced. \* \* \* [W]e do not find any persuasive reason to extend *Escobedo* and *Miranda* to cases tried before those decisions were announced, even though the cases may still be on direct appeal. Our introductory discussion in *Linkletter*, and the cases cited therein, have made it clear that there are no jurisprudential or constitutional ob-

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<sup>28</sup> *Mapp* and *Griffin* of course both antedated the Court's path-breaking decision on non-retroactivity in *Linkletter*.

stacles to the rule we are adopting here. \* \* \* In appropriate prior cases we have already applied new judicial standards in a wholly prospective manner.

Accordingly, the Court held that *Escobedo* and *Miranda* would be given "[p]rospective application only to trials begun after the [new] standards were announced \* \* \*" (384 U.S. at 732).

When again confronted with a similar "open issue" in *Stovall*, this Court reaffirmed that for purposes of retroactivity "no distinction is justified between convictions now final \* \* \* and convictions at various stages of trial and direct review" (388 U.S. at 300). There, the Court concluded that the same factors which demonstrate the inappropriateness of retroactivity in general "make that distinction unsupportable" (*ibid.*). Moreover, it should be noted that in *Stovall*—the most recent non-retroactivity decision rendered after briefing and argument—the Court adopted a rule of prospectivity which went beyond that announced in *Johnson*. In *Stovall* the Court held "that *Wade* and *Gilbert* affect only those cases and all future cases which involve confrontations for identification purposes conducted in the absence of counsel after [the date of the *Stovall* decision]" (388 U.S. at 296). Thus, unlike the *Johnson* rule applying *Escobedo* and *Miranda* to trials begun after the dates of those decisions—where interrogations without counsel or without adequate warnings might have been conducted prior to the effective dates of the new rules—*Stovall* held that *Wade* and *Gilbert* would apply only to identification confrontations conducted



after the new rule's effective date. Thus, in the evolution of the doctrine of non-retroactivity, *Stovall* reflects the Court's determination that hereafter prospectivity of application, where appropriate at all, means application to future conduct violative of the rule announced.<sup>29</sup>

Petitioners complain, however, that under such an approach, only petitioner Katz, of all the subjects of past electronic surveillances, will benefit from the new requirement, while otherwise they would "stand in full beneficiary \* \* \* enjoyment of the *Katz* rule" (Pet. Br. 54-56).<sup>30</sup> "Enjoyment" of that rule, however, is hardly a matter of right. As pointed out in

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<sup>29</sup> In *DeStefano* the Court held that *Duncan* and *Bloom* would be applied only to trials commencing after the date those decisions were announced. This indicates no retreat from the rule of prospectivity settled upon in *Stovall*, however. Because of the nature of the new rules announced in *Duncan* and *Bloom*—requiring jury trials in State criminal and contempt cases, they admit only of such an application. Indeed, the Court in *DeStefano* stated that *Duncan* and *Bloom* "should receive only prospective application" (slip op., p. 2; see also *id.* at p. 4 n. 2).

<sup>30</sup> Petitioners also seek to impart some legal significance to the fact that the surveillance in *Katz* took place several months prior to the surveillance in this case (Pet. Br. 54). A similar contention was summarily disposed of by this Court in *Linkletter* (381 U.S. at 639):

Nor can we accept the contention of petitioner that the *Mapp* rule should date from the day of the seizure there, rather than that of the judgment of this Court. The date of the seizure in *Mapp* has no legal significance. It was the judgment of this Court that changed the rule and the date of that opinion is the crucial date.



*Stovall*, a litigant whose case results in the establishment of a new rule is himself a "chance beneficiary" of that rule, who is accorded its benefit to avoid relegating constitutional adjudications to the status of "mere dictum"—(388 U.S. at 301). Where there is no reason for a general retroactive application of a new rule, there is neither any reason to enlarge the group of "chance beneficiaries" to include those who, through accidents of time, are found with their convictions—wholly proper under prior law when rendered—still in the process of appellate review.<sup>31</sup> While recognizing that "[i]nequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue," the Court, in *Stovall*, concluded that "the fact that the parties involved are chance beneficiaries is an insignificant cost for adherence to sound principles of decision-making" (*ibid.*). Petitioners also seek to invoke the Court's reference to "the possible effect upon the incentive of counsel to advance contentions requiring a change in the law" (*ibid.*) as a reason for

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<sup>31</sup> In two recent decisions, the Seventh Circuit has applied the *Katz* holding to pending cases, without discussion or apparent consideration of the propriety of such a retroactive application. *United States v. Hagarty*, No. 15881, decided January 11, 1968; *United States v. White*, Nos. 16021-16022, decided March 18, 1968. In *Hagarty*, the government filed an unsuccessful petition for rehearing. In *White*, the government, on April 19, 1968, filed a petition for rehearing *en banc* urging that the court of appeals withhold action on the case pending the decision of this Court in the present case.

holding decisions like *Katz* applicable at least to cases still in the process of direct review. It is enough to note that, while the Court did refer to this consideration in *Stovall*, it found it of sufficient importance only to conclude that Wade and Gilbert should be given the benefit of the rule adopted in their cases, and refused to apply the holding in those cases to "litigants similarly situated in the trial or appellate process who have raised the same issue" (*ibid.*). Moreover, it seems unlikely that the incentive of counsel in individual cases to seek changes in existing law will be significantly dulled by the possibility that another lawyer somewhere has a similar case, raising the same issues, which might ultimately reach decision prior to his case.<sup>32</sup>

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<sup>32</sup> Petitioners' strained effort (Pet. Br. 77-79) to distinguish the instant case on the ground that a federal prosecution is here involved, while in *Linkletter* and its progeny state prosecutions were involved, must fall of its own weight. *Linkletter* and *Tehan* of necessity involved only State prosecutions, for the rules of *Mapp* and *Griffin* had long been adhered to in federal criminal cases. But *Miranda* plainly affected federal as well as State cases, and *Gilbert* was itself a federal case. Yet, no distinction was made, in regard to retroactivity or non-retroactivity, depending on whether the newly announced rule would affect federal as well as State prosecutions. Indeed, in *Linkletter* and *Tehan* the Court acknowledged that the new rules of *Mapp* and *Griffin* had previously been given limited retroactive application to cases on direct review, while in *Johnson* and *Stovall* the new standards were given prospective effect only, although federal as well as State cases were obviously affected. Realization of this fact undercuts any argument grounded on a federal-state distinction in assaying the effect of new rules of criminal procedure, and renders this

II. UNDER THE APPLICABLE LAW PRIOR TO THE TIME OF THE KATZ DECISION, THE DISTRICT COURT PROPERLY ADMITTED EVIDENCE OF THE HOTEL ROOM CONVERSATIONS WHICH HAD BEEN OVERHEARD WITHOUT A PHYSICAL TRESPASS.

A. Under the law applicable prior to the time of the *Katz* decision, the district court plainly committed no error in admitting evidence of the conversations monitored at the Waldorf-Astoria Hotel. As noted above, this Court had previously sustained, against constitutional challenge, the admissibility of evidence obtained by electronic surveillance where the installation of the electronic device did not involve a physical trespass into a constitutionally protected area, *Goldman v. United States*, 316 U.S. 129, as opposed to a situation where the installation did involve such a trespass, *Silverman v. United States*, 365 U.S. 505. See *Lopez v. United States*, 373 U.S. 427, 438-439. The courts of appeals had consistently recognized, upheld, and applied that distinction. See e.g., *Smayda v. United States*, 352 F.2d 251, 257 (C.A. 9), certiorari denied, 382 U.S. 981; *United States v. Pardo-*

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consideration irrelevant in determining whether such rules should be given retroactive or prospective application.

Petitioners' passing reliance on this Court's supervisory power over the federal courts (Pet. Br. 78), as a reason for holding *Katz* totally or at least partially retroactive, must likewise fail. *Katz* plainly affects state as well as federal prosecutions, and whether it is to be given retroactive effect or not is in no way dependent on the fact that both *Katz* and the instant case are federal in character. Moreover, petitioners present no persuasive reasons why this is an appropriate occasion for application of the supervisory power.

*Bolland*, 348 F.2d 316, 321 (C.A. 2), certiorari denied, 382 U.S. 944; *Jones v. United States*, 339 F.2d 419, 420 (C.A. 5), certiorari denied, 381 U.S. 915; *Cullins v. Wainwright*, 328 F.2d 481, 482 (C.A. 5), certiorari denied, 379 U.S. 845; *Anspach v. United States*, 305 F.2d 48 (C.A. 10), certiorari denied, 371 U.S. 826; *Carnes v. United States*, 295 F.2d 598, 602 (C.A. 5), certiorari denied, 369 U.S. 861.

In the instant case, the district court, after a thorough evidentiary hearing during which the electronic equipment was displayed, reinstalled, and explained, specifically found that the monitoring of the hotel-room conversations by the means employed by the agents did not in fact involve any degree of physical trespass (R. 3778-3782). It was "no more a trespass," the court concluded, "than if I were to put my ear against the wall" (R. 3781). Consequently, under the decided cases, there was no reason to exclude evidence of petitioners' conversations.<sup>33</sup>

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<sup>33</sup> Petitioners asserted for the first time in the court of appeals, and now assert before this Court, that by placing an ordinary microphone next to the clearance space beneath one of two doors separated by an airspace there is created, in effect, a parabolic microphone (Pet. Br. 92-93). The argument is predicated upon a misunderstanding either of the operation of a parabolic microphone or of the physics involved in the installation here employed; it is drawn from the language of a self-styled electronic eavesdropping "expert" in an affidavit filed with the court of appeals in support of an unsuccessful motion to reexamine the tape by means of electronic test equipment as well as by ear. In any event, whatever name petitioners choose to apply to the agent's monitoring equipment, the only matter of legal relevance is the fact that the



While recognizing the above "widely held view concerning the pre-Katz Federal case law on electronic eavesdropping" (Pet. Br. 118), petitioners argue that the trespass distinction was eliminated in *Osborn v. United States*, 385 U.S. 323, and that "*Osborn* one year before *Katz*, laid down the same principle as in *Katz*, \* \* \* namely, that the Fourth Amendment applies to 'non-trespassory' electronic eavesdropping" (Pet. Br. 121). This is an unwarranted interpretation of the *Osborn* holding. There the Court noted that a covert recording by a participant to the conversation was involved, not a surveillance by a third party, and that "[u]nless *Lopez v. United States*, [373 U.S. 427] is to be disregarded,

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use of the equipment involved no physical trespass of 'any degree. Petitioners' more general assertion, that such a structure containing an airspace is designed to assure privacy and yet was here utilized in a manner which in fact enhanced the effectiveness of the monitoring (Pet. Br. 94-95), similarly lacks evidentiary support. The *Pardo-Bolland* case, in which there was a single door between the two rooms, demonstrates the immateriality of an airspace to the functioning of such equipment as was here employed. The assertion also lacks relevance in law. Certainly there is no reason to accord an airspace separating two doors any more legal significance than an airspace between the studs separating the exterior surfaces of a wall. See *Goldman v. United States*, 316 U.S. 129. Moreover, petitioners' elaborate effort to distinguish the method of monitoring employed here from the closely parallel situation involved in *Pardo-Bolland* (Pet. Br. 91-96), is wholly unconvincing (see *supra* pp. 32-33). Finally, what legal significance petitioners seek to attach to the fact that hotel officials cooperated with the government agents here, and to the possibility that the hotel's electric current might have been used to operate the monitoring equipment (Pet. Br. 95-96, 99), is difficult to understand.



therefore, the petitioner cannot prevail" (385 U.S. at 327). The Court went on to note, however, that it need not rest its decision upon the *Lopez* holding, since the antecedent judicial authorization for the recording which had been obtained during the investigation of Osborn comported with the Fourth Amendment requirements as viewed and expressed in both the concurring and dissenting opinions in *Lopez* (*id.* at 327-331). This is far from announcing a holding that, contrary to *Goldman*, the Fourth Amendment is thereafter to be considered applicable to instances of non-trespassory surveillance. In any event, whatever argument may be made concerning the effect of *Osborn* upon the trespass distinction to which prior cases had adhered, there is no more reason to find *Osborn* retroactive than there is to find *Katz* retroactive. *Osborn*, like *Katz*, was decided while the present case was pending on appeal.

B. In addition, petitioners attack the sufficiency of the evidence to support the district court's finding that there was no trespass. They contend that discrepancies appear when the testimony of the various agents is compared, and that the question thus arises "whether the agents told the truth at all" (Pet. Br. 97-102). Evaluation of credibility, of course, is a matter for the trier of fact. In any event, there is nothing in the record to support petitioners' argument. The testimony to which petitioners refer is that concerning the opening of the door on the agents' side of the connecting doorway between rooms 1600 and 1602. While petitioners seek to suggest that the testimony was contradictory and evasive, the record

references set forth in their argument fail to support either their specific or their general contentions. The record of the hearing, specifically including the portions cited by petitioners, shows that only the door which opened from the agents' room was opened; that that door was opened only once, immediately after agents Kiere, Smith, Weinberg, and Klempner first entered the room; that it was closed a minute or so later; and that the existence of the second door was later related to agent Durham after he arrived at the hotel with the electronic surveillance equipment (R. 3404, 3415, 3417, 3438, 3510-3512, 3524-3528, 3748-3749, 3758).<sup>34</sup> There is similarly no basis for petitioners' related contention, that the testimony as to the location of the electronic installation is impugned by agent Weinberg "who swore that he had seen no electronic apparatus in the agents' room at all" (Pet. Br. 102). The portion of the record cited by petitioners in support of the quoted statement shows that agent Weinberg in fact testified that he had seen no such equipment in the room when he first entered with the other three agents prior to agent Durham's arrival (R. 3769-3771), or when he returned half an hour or so after he had first entered (R. 3771-3774), but that, when he thereafter visited the room again, he observed the towel along the bottom of the door-

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<sup>34</sup> Agent Durham's absence when the door was opened of course explains why he testified that he never saw the door opened, contrary to petitioners' intimation that his statement in this respect is contradictory and suspicious (see Pet. Br. 100-102).

way, the wire leading from it, and the tape recorder (R. 3772-3773).<sup>35</sup>

Petitioners further contend that, contrary to all the testimony at the pre-trial hearing, the microphone must have been located in petitioner Nebbia's room rather than the agents' room, because, if located in the latter, the microphone would have picked up sounds of the agents using their short wave radio, telephone, typewriter, and tape playback mechanism, yet no "perceptible amount" of such sounds was recorded by the sound-actuated tape recorder (Pet. Br. 103-104). This contention is fully answered by the record. The microphone, which was placed next to the floor on the agents' side of the first door, was shielded from sounds originating in the agents' room both by a mask of adhesive tape and by a folded bath towel (R. 3211-3213; Gov. Exhs. 3, 4). Moreover, instead of being set for automatic operation by means of the sound-actuated switch, the recorder was oper-

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<sup>35</sup> Petitioners also seek to impugn agent Durham's credibility by arguing that the particular model of microphone used in the surveillance was of an impedance which would not have worked with the tape recorder (Pet. Br. 98). This argument has no foundation in the record; it was made for the first time in the court of appeals and is based upon the affidavit filed by petitioners' electronic "expert." Moreover, the basis for the argument is in fact erroneous. Whether the resistance of the microphone was 1700 ohms or 1000 ohms, it was still of an impedance which would work well with the recorder. In any event, agent Kiere, who operated the equipment during the surveillance, testified that the separate amplifier was connected between the microphone and the tape recorder at all times (R. 3218-3219; see R. 3210-3211), thus rendering immaterial the question whether the microphone by itself properly matched the input of the recorder.

ated manually by agent Kiere whenever he wanted to make a recording (R. 374, 658-661, 669-670, 3215-3216, 3225-3226), and the door to the bathroom was kept closed on those occasions (R. 373, 668-668a, 3215-3216). Finally, the short-wave radio, typewriter, tape playback mechanism, and generally the telephone, were used before and after, but not during the recordings of conversations (R. 700, 702-704, 857-858, 930-932). In the few instances where the telephone was used during a recording the tape contained noises evincing such use (see, *e.g.*, R. 594-595, 620, 660).

In view of the above evidence, there is plainly no reason to question the district court's finding that the electronic surveillance did not involve a physical trespass. Correspondingly, there was no reason for the court of appeals to have ordered a second hearing on the Waldorf-Astoria monitoring at the time it remanded the case for a hearing on other instances of electronic surveillance (see *infra*, pp. 59-60).<sup>36</sup>

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<sup>36</sup> Petitioners' argument (Pet. Br. 114-117) concerning the President's policy directive of June 30, 1965, affords no reason for excluding from evidence the hotel room conversations overheard in this case. Whatever the validity of their argument that evidence secured in contravention of executive policy should not be admissible, the overhearing in this case, as we have noted previously, involved no impropriety under existing law. See Memorandum for the United States, in *Kolod v. United States*, No. 133, 1967 Term; Supplemental Memorandum for the United States in *Schipani v. United States*, No. 504, 1966 Term; Supplemental Memorandum for the United States in *Black v. United States*, No. 1029, 1965 Term. In none of these cases did the government take the position that non-trespassory electronic surveillance was inconsistent with governmental policy. No question of the nar-



III. IT WAS PROPERLY DETERMINED, AFTER AN ADEQUATE HEARING, THAT THE USE OR ATTEMPTED USE OF ELECTRONIC EQUIPMENT WITH RESPECT TO CERTAIN OF THE PETITIONERS IN NO WAY AFFECTED THE INSTANT PROSECUTION.

A. Following the argument of this case in the court of appeals on January 19, 1967, the United States Attorney, in response to a letter from the Clerk of the Second Circuit, informed the court on April 27 that there had been two other instances of use or attempted use of electronic surveillance equipment with respect to petitioners, apart from the Waldorf-Astoria surveillance, but that in neither had any information been obtained which affected this prosecution (R. 4777; see Pet. Br. 109-110 for text of letter).<sup>37</sup>

otics agents in the instance<sup>t</sup> case acting *ultra vires*, as petitioners asserts, is thus presented.

<sup>37</sup> Previously, on February 15, 1967, the United States Attorney had written to the panel advising them that review had been undertaken with regard to this case, but that no eavesdropping had been discovered which in the government's view was arguably material to the case. Following a defense motion challenging the adequacy of the government's disclosure of February 15, the court of appeals requested a "clarification" of the United States Attorney's letter. The letter of April 27, 1967, followed. Before the trial, the Assistant United States Attorney had represented that he knew of no eavesdropping in relation to the case other than the Waldorf-Astoria incident (R. 3157-3161). The letter of the United States Attorney (Pet. Br. 89-90) stated that his office had been unaware of either of the incidents revealed in the letter until a review by the Department of Justice brought them to light following the trial. The district judge specifically found that this was so (Pet. App. 45a-46a). Accordingly, petitioners' repeated references to obstructive and evasive tactics by the government in making disclosures of electronic monitoring



One had taken place in Columbus, Georgia, on December 18, 1965 (shortly before petitioners' arrest), and had provided no evidence of any kind since the equipment malfunctioned. The other had occurred between April 25, 1962, and April 1, 1963, before the formation of the conspiracy here involved, in a restaurant in Dade County, Florida, and had resulted in the overhearing of conversations of petitioner Dioguardi involving matters wholly unrelated to the instant prosecution (Pet. App. 34a-37a). On May 29, 1967, the court of appeals remanded the case to the district court for a "prompt and full" hearing limited to the two instances of electronic surveillance disclosed in the United States Attorney's letter. Petitioners moved for a modification of the order to require the hearing to cover any and all electronic surveillance which may have related to this case, including the Waldorf-Astoria incident. On June 14, 1967, the court of appeals issued an order enlarging the scope of the hearing to cover all instances of electronic overhearing which may have affected this case, but excepting the Waldorf-Astoria incident.

Petitioners contend (Pet. Br. 89) that the exclusion of the Waldorf-Astoria eavesdropping from the remand hearing was error. Since, however, the matter had already been thoroughly canvassed at trial (see *supra*, pp. 7-10), the court of appeals had every

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involving them (*e.g.*, Pet. Br. 110) are unwarranted. It is only after the review procedure described in our *Schipani* memorandum (see note 36, *supra*) had been instituted that the other instances were discovered, and both of them turned out to be wholly immaterial.

reason to conclude that no useful purpose would be served by repetition.

B. The disclosure by the United States Attorney showed on its face that the two instances of overhearing or attempted overhearing had resulted in no evidence which tainted this case. After a lengthy hearing on eight different days between June 17 and July 25, 1967, resulting in more than 800 pages of transcript (R. 3912-4736), the district court found this to be fully confirmed.

1. The first instance of monitoring disclosed by the government occurred between April 25, 1962, and April 1, 1963, long before the formation of the conspiracy charged in this indictment. The overhearing was directed at one Tony Ricci and was effected by a device installed by trespass in the Casa Maria Restaurant in Dade County, Florida (R. 4321-4322).

At the district court hearing, there was considerable testimony as to the manner in which records of this overhearing were taken and kept. Conversations were monitored by clerks at the F.B.I. office in Miami and recorded on daily logs. When the matter overheard appeared to be irrelevant, only handwritten notes were taken and the items were summarized on the log sheets. The clerks were instructed to resolve doubts in favor of relevance. Relevant conversations were tape-recorded. The tapes were replayed and the clerks, using both the tapes and their handwritten notes, attempted to obtain a verbatim transcript of the conversation which was entered in the log. As soon as the log sheets were prepared, the handwritten notes were destroyed. The tapes were kept for a pe-

riod of seven days and then erased (unless a special request was made to retain them longer), so that they would be available for reuse. All tapes relating to the Casa Maria installation had been erased in normal course (R. 4040, 4071, 4073, 4104-4106, 4112, 4161, 4324, 4326, 4339).

The log sheets covering the entire period of the electronic surveillance (Gov. Exh. 100) were turned over to the judge for *in camera* inspection. The trial judge found, as the government had represented, that only petitioner Dioguardi, of all the defendants, was at any time overheard (Pet. App. 44a; R. 4118, 4243). A separate exhibit (Gov. Exh. 103) was prepared of all conversations which possibly pertained to Dioguardi, and a copy thereof was furnished to defense counsel five days prior to the taking of any testimony and again during the hearing (see R. 4026-4028; Pet. App. 45a). They showed that Dioguardi had been overheard talking about the operations of Ricci's restaurant. The F.B.I. agent in charge of the Casa Maria surveillance (agent Swinney) testified that the Ricci investigation never led to an investigation of Dioguardi (R. 4345-4346).

Petitioners complain because they were not shown the complete logs of the Ricci surveillance. However, the surveillance, conducted before the formation of this conspiracy, was obviously irrelevant to the present case. It was only because Dioguardi's voice was picked up that the government had the duty to make any disclosure at all. Petitioners were clearly not entitled to read what had been said about other matters by other persons who were not involved in the present

case. The task of determining whether any of the present defendants other than Dioguardi had been overheard, and whether there were any conversations of his other than those disclosed, was a mechanical one in which defense counsel could be of no assistance to the court. There was thus no reason for the court to turn over all the logs. In this regard, nothing in this Court's *per curiam* opinion in *Kolod v. United States*, No. 133, 1967 Term, announced January 29, 1968, requires that a different procedure be followed. At most, that decision requires that records of all conversations involving a monitored defendant be made available to defense counsel so that an adversary proceeding on the question of taint might be conducted. That requirement was amply complied with here.<sup>38</sup>

2. With regard to the attempted overhearing on December 18, 1965, the government's evidence revealed that Bureau of Narcotics agents installed an electronic transmitting device in an automobile which they knew petitioner Nebbia had arranged to rent from the Avis rental agency in Columbus, Georgia. The agents in another car equipped with a receiver followed that car (in which were present, at various times, petitioners Nebbia, Desist, and LeFranc) from noon to midnight on December 18, 1965. However, the device failed to function properly and the agents heard nothing but sporadic static (R. 4190-4194, tes-

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<sup>38</sup> Moreover, *Kolod* is still pending before the Court on the government's motion for modification, restored to the calendar on June 17, 1968, for reargument at the 1968 Term.

timony of agent Kiere; R. 4595, 4609-4610, testimony of agent Matuoizzi; R. 4679, 4689, testimony of agent Waters). Correspondence between the Department of Justice and the Bureau of Narcotics, reflecting the fact that nothing had been overheard during the attempted December 18 surveillance of the rented car, was turned over to defense counsel (R. 4595-4596, 4600; see Pet. App. 49a-50a, for text of correspondence).

Allegedly in relation to this issue, petitioners offered the testimony of Mr. Kennington and Mr. Brown, the day and night managers, respectively, of the Black Angus Motel in Columbus, Georgia during December of 1965 (R. 4387-4388, 4460). Petitioner Desist registered at this motel on December 17, 1965. Bureau of Narcotics agents Waters and Selvaggi registered the following day (R. 4389, 4410, 4694). Kennington testified that on December 20, 1965, agent Waters invited him to his room to observe the narcotics which the agents had seized. While in the room with several other persons, Kennington testified he had conversation with a man (presumably an agent) whom he could not identify. In response to Kennington's question as to how the narcotics were smuggled into the United States, the unknown person replied: "It was brought in in a deep freeze \* \* \* and on the way down from Atlanta, we kept in touch with him through conversation" (R. 4465-4467, 4472, 4480). Defense counsel asked if the person had said how the agents acquired this information, and Kennington answered "no" (R. 4474). Defense counsel then showed Kennington his written statement, given the day be-



fore to one John Broady, petitioners' investigator. Asked whether his written statement had refreshed his recollection, Kennington replied (R. 4480): "Well, the only thing I could say that they said they got a lot of information following them around, and that is as definite as I can speak." When Kennington resumed the stand following the luncheon recess, he stated that he wished to "retract" a portion of his testimony. He then testified that he heard the agents say "they had a transmitter in the car, but they were not talking to me directly" (R. 4490-4491, 4493). When the court queried Kennington about his inconsistencies, he replied (R. 4493-4494): "Well, I am a little confused, sir."

Brown, who testified mostly as to other matters (see *infra*, pp. 65-66), at one point in his testimony stated that, while at the switchboard on December 18, 1965, he overheard a conversation to the effect that the agents could "hear from one car to the other" (R. 4421-4422).

The district judge found that the testimony of Kennington and Brown was marked by inconsistencies and confusion and was not believable when viewed against the government agents' straightforward testimony and the correspondence indicating that no conversation among any of the petitioners had been overheard during the automobile surveillance on December 18, 1965 (Pet. App. 57a, 51a). His findings in this regard are clearly supported by the evidence.

3. Although the scope of the remand hearing was limited to instances of electronic eavesdropping, the trial judge permitted Brown to give testimony re-

garding two other incidents of alleged illegal invasion of petitioner Desist's rights. Brown testified that on December 19, 1965, between 7:00 and 9:30 p.m., Desist received a telephone call. Pursuant to the agents' prior instruction to summon them if Desist received any telephone calls, Brown summoned agent Waters and handed him the phone. Brown testified that the conversation evidently ended when Waters took the phone and that Waters held the phone only a "few short seconds" (R. 4425-4426, 4455; see R. 4440). The conversation, it should be noted, was in French (R. 4426). On cross-examination, Brown evinced uncertainty as to when this alleged incident had occurred. He testified that he believed it had taken place in the morning of December 19, rather than the evening, as he had earlier testified. When shown a copy of his prior statement to Mr. Broady, petitioners' investigator, Brown testified that the incident had occurred in the evening (R. 4447-4449, 4452).

Brown also testified that on December 18, 1965, he gave agent Waters the key to Desist's motel room and watched the agents go to the building which contained it, although he did not see them enter the room. They came back after a minute or a minute and a half and returned the key, saying, according to Brown, that "he is our man" (R. 4413-4414). Defense counsel twice asked Brown if the agents had stated that they had examined the contents of the room and Brown answered "no" (R. 4430-4431). When defense counsel showed Brown his prior written statement to Mr. Broady, Brown then testified that he recalled the agents saying that they had examined the contents

of the room (R. 4431-4432). Brown stated, after answering, "you see, I am old. I have to think a lot" (R. 4433). Brown admitted on cross-examination that petitioners were paying his plane fare, hotel bills, meals, and his claimed daily earnings of \$50 as a self-employed insurance salesman (R. 4450).

Agent Selvaggi testified that Brown, without being requested, gave Waters the key to Desist's room. The agents never used the key and returned it after some hours (R. 4697-4699). Waters testified that he did not ask Brown for Desist's room-key and never entered his room (R. 4671).

In these circumstances, the district judge was amply justified in finding that Brown's testimony did not "rise to the level of credible evidence" (Pet. App. 51a).

C. The length of the hearing on remand in itself refutes petitioners' contention that they were foreclosed from making legitimate inquiry into the circumstances of the electronic monitoring incidents. During the period from June 7 to July 25, 1967, petitioners were granted numerous continuances to enable them to pursue an independent investigation (R. 3923-3924, 3945, 3960-3963, 3972, 3981-3982, 4007-4008, 4199-4201, 4211-4212, 4229, 4231, 4239-4242, 4369, 4377, 4379, 4581-4584). As noted above, they were afforded access to the pertinent government records (Pet. App. 44a-51a); they examined and cross-examined the government agents involved; and they offered witnesses of their own. The Assistant United States Attorney who had prosecuted the case and numerous agents of the Bureau of Narcotics and the

F.B.I. testified that they knew of no incidents of electronic surveillance involving any of petitioners other than the two revealed in the United States Attorney's letter, apart from the Waldorf-Astoria occasion (*e.g.*, R. 4197, 4201-4202, 4266, 4303, 4607; see Pet. App. 40a).

Petitioners contend that the hearing was improperly restricted in that the trial judge did not require the government to summon additional witnesses. At the hearing on July 6, 1967, defense counsel submitted a tentative list of 37 witnesses whom they wished produced at government expense (R. 4233). Included were an employee of the Avis car rental agency, numerous narcotics agents and other government officials, the commanding officers of various army posts in Maryland, Georgia, North Carolina, and France, and members of the Georgia police (Pet. Br. A97-A99). The court required, as to most of the witnesses on the list, that an offer of proof be made as to the relevancy of their testimony. Petitioners submitted a "statement of relevancy" on July 11 (Pet. Br. A100-A104). After reading it, the court refused petitioners' request to be allowed to call these witnesses and characterized petitioners' proposal as a "grandiose fishing expedition" (R. 4358-4365). At various points in the hearings, the court did order the government to produce certain agents on the list (*e.g.*, Matuoizzi and Schrier).<sup>39</sup> In response to the court's suggestion,

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<sup>39</sup> Matuoizzi was the chief enforcement agent of the Bureau of Narcotics for the Southern District of New York. He was in Atlanta at the time of the car surveillance, but did not actually participate in the attempted monitoring. He



the government called as witnesses agents Fitzgerald<sup>40</sup> and Swinney and Assistant United States Attorney Tendy, who had prosecuted at the trial, all of whom were on petitioners' list. In view of the conclusive nature of the showing made by the government that, apart from the Waldorf-Astoria occasion, no electronic surveillance of petitioners other than the two admitted incidents had occurred, and that, as to those, nothing relevant was obtained, the district judge was clearly justified in refusing to permit petitioners to summon additional witnesses whose pertinence to the inquiry had not and has never been satisfactorily explained.

In sum, the breadth of the hearing conducted by the trial judge was more than sufficient to accord petitioners the "opportunity \* \* \* to prove that \* \* \* the case against [them included] a fruit of the poisonous tree" (*Nardone v. United States*, 308 U.S. 338, 341). The government's proof was so overwhelming that not even "sophisticated argument" could show a "causal connection between information obtained through illicit [electronic surveillance] and the Gov-

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testified he was told by other agents that nothing was heard during the surveillance and that the device did not function (R. 4595, 4609-4610). Schrier was a supervisor with the Bureau of Narcotics office in New York. He testified, *inter alia*, that no electronic surveillance of petitioners, other than the three incidents enumerated, had occurred.

<sup>40</sup> Fitzgerald was the Bureau of Narcotics agent in charge of the squad which conducted the investigation leading to the prosecution of petitioners. He testified that he knew of no electronic surveillance of petitioners other than the incidents enumerated (R. 4296, 4304).



ernment's proof" at trial (*ibid.*). Indeed, the hearing conducted, while confined by the trial judge to something less than a "grandiose fishing expedition," illustrates the extent of judicial resources which may be consumed in the pursuit of even clearly groundless claims of taint arising from instances of electronic monitoring. Plainly, there is neither need nor occasion for this Court to consider further what has already been so thoroughly canvassed below.

#### IV. PETITIONERS' OTHER CONTENTIONS ARE INSUBSTANTIAL.

In addition to the foregoing arguments, petitioners present various other contentions which were rejected by the court of appeals and which they did not discuss in the petition for a writ of certiorari but "preserved" in the event that certiorari was granted. We assume that the Court's grant of certiorari in the present case was directed principally, if not entirely, to the question whether the *Katz* rule should be given retroactive effect, and perhaps as well to the issues concerning the validity of the electronic eavesdropping under *pre-Katz* decisions and the scope of the remand hearing. Accordingly, we treat the remaining points discussed in petitioners' voluminous brief summarily. All of those points relate either to the sufficiency of the evidence or to discretionary determinations made by the district court. All were thoroughly considered by the court of appeals, and are lacking in substantial merit. In no event, considered individually or collectively, do they warrant reversal of petitioners' convictions.

**A. Admission of the Waldorf-Astoria tapes was proper.**

1. Prior to the introduction of the tape recordings of the Nebbia-Desist and Nebbia-LeFranc conversations at the Waldorf-Astoria, the trial judge conducted an extensive, two-day voir dire examination of the tapes (R. 387-547). The conversations, which had been simultaneously monitored and tape-recorded by narcotics agent Kiere, were in French. The trial judge (Judge Palmieri) was fluent in French (R. 409), as was agent Kiere (R. 372-373). Defense counsel were assisted at the hearing by two French-speaking associates, Messrs. Raffin and Bernstein (see R. 405-412). At the hearing the tapes were played, copies of the transcripts (in English) prepared by agent Kiere were furnished to defense counsel, and defense counsel were allowed to make their own copies of the recordings (See R. 542-552). The trial judge found that many portions of the tapes were "abundantly clear \* \* \* and there cannot be any possible doubt as to what the parties were saying" (R. 515). Although the court also found that certain passages were unintelligible, he declined to hold the entire tapes inadmissible for this reason. They were played for the jury after agent Kiere testified to the parts of the conversations he recalled overhearing (R. 553-627).

The procedure followed was unexceptionable. The question whether to admit the tapes was one calling for an exercise of the trial court's discretion. All the considerations which might argue against their admission were fully explored. The fact that certain segments of the tapes were not intelligible did not

render the tapes as a whole incompetent as evidence. *E.g.*, *Monroe v. United States*, 234 F.2d 49 (C.A. D.C.), certiorari denied, 352 U.S. 873; see *Johns v. United States*, 323 F.2d 421 (C.A. 5). Petitioners' further objection (Pet. Br. 128) to one of the tapes which had been processed through a noise suppressor is likewise without merit. *E.g.*, *Fountain v. United States*, 384 F.2d 624 (C.A. 5), certiorari denied, April 1, 1968, No. 1109, 1967 Term.

2. Petitioners' principal contention, however, appears to be that the trial judge erred in failing to appoint an outsider as translator to ensure that a wholly impartial translation of the tapes was made. As the record shows, the trial judge attempted to work out with counsel a procedure for translation of the tapes which would be both fair and acceptable to all parties. The basis of the procedure settled upon was agent Kiere's translation, prepared after extensive replaying of the original and filtered tapes (R. 398). The system initially followed at the hearing was to play and replay every word on the tapes in an effort to reach agreement on the correct meaning (see R. 408-459). Thereafter, defense counsel declined to attempt to reach agreement on a translation, preferring to rely on their right to cross-examine Kiere at the trial (see R. 504-506). The tapes were then played for their benefit, and they were permitted to make copies for use during the trial (R. 536-538).

The procedure adopted and the refusal to appoint a different translator were not prejudicial. Petitioners were permitted to, and did, exercise their right

to cross-examine Kiere as to his translation (*e.g.*, R. 732-741). They could have called their own expert to seek to attack Kiere's translation had they deemed the effort worthwhile. As the court of appeals succinctly put it, "[u]nder the adversary system the Government was allowed to use its agent as an expert witness" (Pet. App. 21a). The unfairness which petitioners urge is, as the court below stated, "illusory" (*ibid.*).

3. Petitioners contend that the "climax of unfairness" (Pet. Br. 160) occurred when the trial judge referred in the jury's presence to a written "word for word translation" (R. 570) of the tapes which agent Kiere looked at occasionally while translating the tapes for the jury. This remark, however, was prompted by defense counsel's objections (R. 566, 569) which, the court accurately indicated, implied that the witness was looking at something improper (R. 571, quoted at Pet. Br. 99). In fact, the transcripts had been supplied to Kiere for use as a guide to indicate the appropriate places to stop the tape in order to allow him to translate a complete segment (R. 555-566). The jury had been apprised of the existence and nature of the transcripts from Kiere's earlier testimony (R. 378).

4. Petitioners also argue (Pet. Br. 130-133) that there was insufficient evidence as to the identity of the respective speakers whose voices were recorded on the tapes. However, at the same time that agent Kiere was monitoring the conversations taking place in room 1602 of the Waldorf-Astoria Hotel, another

agent (Smith) was present with binoculars in a room at the adjacent Park-Sheraton Hotel where he could observe the occupants of petitioner Nebbia's room. Smith testified that the individuals in the room at the time of the conversations of December 16 and 17, 1965, were, respectively, Nebbia and Desist, and Nebbia and LeFranc (R. 362-367).<sup>41</sup> In addition, the identity of petitioners as the speakers was confirmed by their subsequent actions conforming to the plans they discussed in the tape recordings. Thus, for example, it was shown at the trial that Desist flew to Rochester from New York before his trip to Georgia, precisely as the voice attributed to him had been overheard telling Nebbia (see R. 558, 574-576). Thus, the evidence as to identity was clearly sufficient.<sup>42</sup>

5. Petitioner Nebbia raises a separate contention (Pet. Br. 158-161) that he was denied a fair trial by the trial court's statement during the charge to the jury that "I don't think you should have too much trouble finding that one of the voices was Nebbia's" (R. 2372). This statement, however, was made almost immediately after the court's admonition to the

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<sup>41</sup> The fact that one Alriq testified that Desist was with him at the time of the December 16 conversation only raised, as petitioners recognize (Pet. Br. 131), an issue for the jury. The circumstance that the agents did not follow Desist to Rochester hardly has the probative force which petitioners attribute to it (Pet. Br. 131-133), and the significance of this, if any, was similarly a matter for the jury.

<sup>42</sup> The agents' physical surveillance of the trip of Nebbia and LeFranc to Atlanta from Kennedy Airport on December 18, 1965, was prompted by Nebbia's statements to Desist on December 16 (R. 957-959; see R. 559).



jury that they, not he, were the finders of fact (*ibid.*). Moreover, after objection by defense counsel, the court gave a supplemental instruction at the end of his whole charge (R. 2462-2464), explaining that the two or three occasions in his instructions in which he stated that the jury "should have no trouble reaching some conclusion" were not intended to impinge upon the jury's "exclusive fact-finding function." In addition, the court further charged: "I made a comment when I said you should not have any difficulty. When I made that comment, I was doing something that I have the privilege of doing as a Judge of this court, but I also charge you with all the emphasis at my command that you are the exclusive judges of the facts, not I. You will decide what is easy to determine and what is not easy to determine, and I am not to decide it" (R. 2463-2464). Accordingly, since the jury's function was clearly spelled out, there was no impropriety in the court's comment.

***B. The evidence was sufficient to support the jury's finding that petitioners Dioguardi and Sutera knew that the narcotics had been imported.***

1. Petitioners Dioguardi and Sutera argue (Pet. Br. 135-140) that there was not sufficient evidence to show that they knew the heroin they were negotiating to buy was imported, rather than domestic, merchandise. The totality of the circumstances, however, provided ample basis for such an inference. Dioguardi and Sutera flew to New York from Miami for the sole apparent purpose of meeting a man with a French name, a pronounced French accent, and a French ap-

pearance and demeanor,<sup>43</sup> to negotiate the purchase of a huge quantity of pure heroin which the Frenchman promptly told them was "here already"—referring, as the context made perfectly clear, to Atlanta, Georgia<sup>44</sup> (R. 1015-1019, 1053-1066, 1137-1151, 1428). When a Frenchman in New York says something is "here"—referring to a place over 700 miles and eight States away—the reference cannot be understood as denoting anything other than the United States. The conclusion is inescapable that he was referring to something which had been brought into this country. Moreover, it should be noted that the reference occurred while the Frenchman and the two Americans were making arrangements—in an atmosphere of mutual mistrust—for a clandestine, nighttime transfer of "merchandise"<sup>45</sup> which the Frenchman noted was "risky business" and which he said he would be "much relieved" to have over (R. 1060-1064, 1141-1143). In such transfers in the past, he stated, "people have been betrayed" and even "lost" (R. 1062-1063, 1141). Both LeFranc (R. 1061) and Dioguardi (R. 1060) stressed the need to be careful. Thereafter, in returning to the motel where he and

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<sup>43</sup> LeFranc's appearance and manner was such as to prompt Desist to assure Conder that he would recognize LeFranc as a Frenchman (R. 63).

<sup>44</sup> Dioguardi and Sutera knew that LeFranc had never been to Atlanta, and told him he would find it a much cleaner city than New York (R. 1057). They also told him he would enjoy Miami (*ibid.*).

<sup>45</sup> "Merchandise" is a euphemism for "heroin" (see R. 1062, 1140-1141).

Sutera had registered under assumed names, Dioguardi made efforts to assure that he was not being followed (R. 1150-1151, 1361-1367). The jury was amply justified in finding that Dioguardi and Sutera had "actual knowledge that the drugs were illegally imported from abroad," as the court had instructed they had to find to convict (R. 2308).

2. Petitioners' arguments concerning the general sufficiency of the evidence (Pet. Br. 138-140, 161-162) border upon the fanciful. As to petitioners Dioguardi and Sutera, there appears to be no need to elaborate upon the discussion of the point by the court below (Pet. App. 9a-11a). As to petitioners Desist, LeFranc, and Nebbia, "the mass of evidence against [them]," the court of appeals noted, "does not warrant discussion as to its sufficiency" (Pet. App. 11a).

*C. There was no error in the trial court's handling of a request by the jury, after it had retired to consider its verdict, to hear the testimony of two government agents concerning conversations overheard at Adano's restaurant.*

After the jury had retired to consider its verdict, it sent a note to the trial judge stating (R. 2510): "We would like Agent Gruden's and Agent Smith's testimony as to what was overheard at the bar of Adano's restaurant." These agents had testified to the critical conversations on the night of December 17, 1965, between petitioners Dioguardi, Sutera, and LeFranc at the bar in the Manhattan restaurant (R. 1056-1066, 1138-1144, described *supra*, pp. 5-6, 75). After some colloquy with counsel, the court permitted much of the agents' testimony to be read to the jury.

However, he refused petitioners' request that there also be read the bulk of the agents' cross-examination, dealing mainly with their ability to overhear the conversations, ruling that this was not the agents' "testimony as to what was overheard" (R. 2514). As the court of appeals concluded (Pet. App. 32a), interpretation of the jurors' note was a matter for the exercise of the trial judge's discretion. The court's construction of that note was reasonable and was not an abuse of discretion.

***D. The refusal of the trial judge to appoint for petitioner Nebbia a French interpreter who would simultaneously translate the proceedings at trial was not an abuse of discretion, in light of the fact that Nebbia admittedly had funds to procure his own translator and had the assistance of French-speaking counsel.***

Petitioner Nebbia contends (Pet. Br. 148-158) that he had a constitutional right to the appointment during the trial of a personal interpreter, without expense by him, although he himself was well able to pay for that service. This argument is discussed at considerable length and rejected in the opinion of the court of appeals (Pet. App. 25a-30a).

Petitioner Nebbia is a Frenchman who at the time of trial could neither speak nor understand English to any appreciable extent. On January 28, 1966, he had furnished cash bail of \$100,000 (R. 2697-2698). See *United States v. Nebbia*, 357 F.2d 303 (C.A. 2). Nebbia was represented at trial by the New York City firm of Lewy, Rosoff & Stern, all of the partners of which, as listed in the 1966 edition of the Martin-

dale-Hubbell Law Dictionary, are fluent in French.<sup>46</sup> The firm had been requested to represent Nebbia by the French Embassy (R. 2586). Also available to Nebbia at trial, as a means of obtaining an understanding of the proceedings against him and to assist counsel in his defense, was the presence of his bilingual co-defendant LeFranc, with whom he was incarcerated, and LeFranc's bilingual Paris attorney (Mr. Raffin), who was present throughout the trial.

Nebbia's counsel first demanded that the court furnish Nebbia with a French translator at a pre-trial conference on April 27, 1966 (R. 3181-3183). When the court inquired why Nebbia could not "retain an interpreter" (R. 3181), defense counsel, after some colloquy, stated that "it occurred to [him] that if [Nebbia] chose not to advance the money a problem of due process would be presented" (R. 3182). Counsel later informed the court that Nebbia "declined to allow [him] to incur the expense" of obtaining a simultaneous translator (R. 3365). Counsel thereafter made clear to the court that his application for an interpreter was not predicated upon "grounds of poverty or indigence" but upon "constitutional rights" (R. 3368-3369). The trial judge denied the application (R. 3369-3370), having indicated that he could find no "justification for a request by a non-indigent defendant represented by able counsel, privately paid

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<sup>46</sup> Mr. Stream, who actually appeared for Nebbia at trial, apparently became a member of the firm shortly before the notice of appearance was filed (on January 14, 1966). He represented to the district court that he was not fluent in French (R. 1603).



for, to get from the Government the services of a simultaneous translator" (R. 3365-3366). No interpreter was furnished by the government at trial (nor hired by petitioner), and Nebbia relied upon that fact as the basis for unsuccessful motions to dismiss the indictment at the close of the government's evidence (R. 1599-1603) and of all the evidence (R. 1949), and to set aside the verdict (R. 3870-3873).

The trial court's refusal to appoint an interpreter, in these circumstances, was correct. Apart from one State case,<sup>47</sup> we are aware of no American authority holding that a non-indigent, non-English-speaking defendant is constitutionally entitled to the appointment of an interpreter at government expense at trial (see Pet. App. 25a-26a, for discussion of the federal cases bearing on the issue). As the court of appeals found (Pet. App. 27a-28a):

[I]f the real point is guarantee of a fair trial, it is a little difficult to see why Nebbia is not required to lie in the bed that he made. We are aware that trying a defendant in a language he does not understand has a Kafka-like quality, but Nebbia's ability to remedy that situation dissipates substantially — perhaps completely — any feeling of unease. In other words, if Nebbia denied himself the interpreter and stands on his right to do so, does not the issue become solely who should have paid for one? Moreover, we doubt that Nebbia's claimed absolute constitutional right to an interpreter is stronger than the absolute right to a court-appointed counsel; the latter is held only by the indigent, *Gideon v. Wainwright*, 372 U.S. 335, 339-340 (1963) \* \* \*.

<sup>47</sup> *State v. Vasquez*, 101 Utah 444, 121 P.2d 903.

Nor did the trial judge abuse his discretion in refusing to appoint an interpreter. The court indicated (R. 1599) that he had observed Nebbia in conversation with his trial counsel "on many occasions" and had "no doubt" that Nebbia had been sufficiently in communication with him to permit a vigorous and able defense to be conducted. Also available to assist him, as we have pointed out, were the French-speaking partners of Nebbia's counsel and LeFranc's bilingual counsel. Even assuming, as petitioner argues, that the trial judge had authority at the outset of the trial to appoint an interpreter for Nebbia under the then-promulgated but not yet effective Rule 28(b) of the Federal Rules of Criminal Procedure, the failure to do so in these circumstances was not error.<sup>48</sup> In any event, the authority granted under Rule 28(b), assuming its relevancy here, is, by its very terms, discretionary.

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<sup>48</sup> Petitioner's arguments concerning F.R.Crim.P. 28(b) are adequately answered in the court of appeals' opinion (Pet. App. 28a-29a).

## CONCLUSION

For the reasons stated, it is respectfully submitted that the requirement first announced in *Katz v. United States*, 389 U.S. 347, should not be applied retroactively, that none of the other points raised by petitioners warrant reversal of their convictions, and that the judgment of the court of appeals should accordingly be affirmed.

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JULY 1968.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 12

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC,  
JEAN NEBBIA and ANTHONY SUTERA,

*Petitioners,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

JOINT REPLY BRIEF FOR PETITIONERS

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SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC,  
JEAN NEBBIA and ANTHONY SUTERA,

*Petitioners,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

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**JOINT REPLY BRIEF FOR PETITIONERS**

This reply brief will treat only the Government's argument (1) as to retroactivity of the *Katz* decision (G.Br., Point I; Pet. Br., Point I), (2) as to the determinations by both Courts below that the Waldorf-Astoria eavesdropping satisfied pre-*Katz* standards (G. Br., Point II; Pet. Br., Point II), and (3) as to the determinations by both Courts below that there was no other electronic eavesdropping materially affecting this case (G. Br., Point III; Pet. Br., Point II). We shall also discuss briefly relevant decisions handed down since the filing of our opening brief last Spring.

## I. The Katz-Retroactivity Issues

### A. The Government's Policy Preference For The Values Of Law Enforcement And Police Convenience Over The Values Of Individual Privacy.

We do not know of any category of cases (with the single possible exception to be mentioned) in which this Court has ever applied the protections of the Constitution less unstintingly for criminal defendants of a conspicuously unpopular class than for the more "ordinary" classes of criminal defendants. The single possible exception just alluded to might be the restrictive First Amendment decisions in the aftermath of World War I and in the first-round "Smith Act" cases of the early 1950's, involving criminal defendants of exceptional political unpopularity. But the Court has never lowered its protective guard against constitutionally questionable prosecutive methods in cases of non-political crime, not even in the contemporary prosecutive drives against alleged members of "organized crime," and not even in what is probably the area of intensest odium nowadays in this country, narcotics.

However, in the present case the Government is trying to influence this Court's decision by appealing to just such constitutionally invidious considerations (G. Br. 40-42), including reference to lurid Congressional Committee "testimony" about alleged mass murder "of the Government's informants in the organized crime field" (G. Br. 41, at fn. 23).

In the Government's famous "Apalachin" prosecution some years ago this kind of anti-constitutional opportunism was rebuffed by the Second Circuit. *United States v. Buffalo*, 285 F.2d 408 (C.A.2, 1960). In the printed brief in



the Court of Appeals for appellant Bufalino in that case, our colleague who is of counsel for the several petitioners in the instant case wrote words which seem apt here (pp. 33-34 of the Bufalino brief):

"We respectfully suggest that the present case affords to this Court an opportunity to spur the return of a sense of tradition to the law of Governmental inquisition. The departure from law and steadfast democratic tradition which is inherent in oppressive inquisitorial law enforcement is so fundamentally shocking that it is perhaps in the very enormity of this shock that we must search for explanation of the astonishing indifference and insensitivity which so much prevailed among us in recent times concerning these matters. It is not very long ago that a visitor coming upon our scene would have imagined himself viewing a people gathered in a Colosseum to applaud the savagery of the Sovereign himself, as a people once applauded a Commodus. The investigative or police arm of a democratic government exists to serve the people and not to stand as master over them. It is wrong, in a democracy, to prefer the interest of governmental investigative or police policy over the interests of the individual citizen. There is no value whatever in governmental police policy for its own sake. In our society all value is accorded to the individual, and each individual dwells equally under this shield of democratic value."

It is distressing that the Government in this case gives not so much as a sign of acknowledging that electronic snooping by governmental police is at least arguably distasteful, that at least arguably there is something to be said for the countervailing value of individual privacy, or

that, at least arguably this latter value is not less worthy of protection when the electronic snoopers succeed in achieving maximum surreptitiousness by using allegedly "nontrespassory" devices. Only four months ago, in *Lee v. Florida*, — U.S. —, 20 L. Ed. 2d 1166, 1171, this Court approvingly quoted from *Nardone v. United States*, 302 U.S. at 383:

" 'Congress may have thought it less important that some offenders should go unwhipped of justice than that officers should resort to methods deemed inconsistent with *ethical* standards and destructive of *personal liberty*. The same considerations may well have moved the Congress to adopt §605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution.' " (Emphasis supplied)

In calling attention to these *ethical* and *libertarian* standards so recently re-evoked in *Lee v. Florida* (*supra*), we are not overlooking that the forefront issue in our case is as to *retroactivity* of those same standards (already previously evinced in *Katz* for the Fourth Amendment purposes of controlling "nontrespassory" electronic surveillance); we realize the issue here is not as to the *substantive* merits of those *Katz-Lee* standards, which stand settled at least *prospectively*. But when the judicial function, especially the supreme judicial function of this Court, undertakes to devote itself in a given situation (as here) to the vindicating of such high constitutional values, the lawyer's sense of rightness declares that, in such a scene, there is no place for reductive attitudes, no place for formalisms or for technicalisms aimed at shrinking the ambit of the newly

announced constitutional protection, and surely no place for unworthy *ad hoc* considerations, least of all for *ad hoc* considerations *in terrorem*.

In speaking thus we are not motivated, surely, by any thought that *in terrorem* arguments about "organized crime", etc., can avail to deter this Court from enforcing the Constitution. But the Government, in advancing these *in terrorem* arguments in the present case, is invoking formulations which it says this Court has laid down in the decisions commencing with *Linkletter v. Walker*, 381 U.S. 618; and to this argumentative theme of the Government we do feel bound to try to reply. For, the Government's unfortunate outcries in this case against "organized crime", alleged slaughter of government informants, and the like, are presented in the Government's brief (pp. 40-42) as being pertinently addressed to what the Government terms "the third and final factor to be considered" *pro* or *con* retroactivity, namely, "the effect on the administration of justice of a retroactive application of the new standard" (*Stovall v. Denno*, 388 U.S. 293 at 297). It does not seem likely that when the Court thus spoke in *Stovall* it meant to encourage police and prosecutive staffs to hope for some sort of "double-standard" application of the retroactivity-prospectivity rules to spare law enforcement authorities the occasional chagrin of seeing "some offenders \* \* \* go unwhipped of justice" (*Nardone, supra*), even alleged "organized crime" offenders of the even maximally reprobated narcotics-offender group. It does not seem likely that when this Court in *Stovall* spoke of "the effect on the administration of justice" it was thinking only of prosecutors' desire to salvage criminal convictions—even, again, in "organized crime-narcotics" cases.

The Government's argument is, to be sure, that it is proper to speak of "administration of justice" in this *in terrorem* context because these big alleged "organized crime" cases need electronic investigative methods—that the work is too dangerous for the "informer" system. There are several answers to this line of argument.

*First*, if the Government is right that its need for electronic methods justifies salvaging convictions like the instant one as against a retroactivity ruling for *Katz*, then it must follow that the Government still equally needs electronic methods for future-arising cases of this same alleged *in terrorem* magnitude. But this in turn would mean that this Court should withdraw its *Katz* decision altogether, and not merely quarantine *Katz* against retroactivity. Indeed, if the Government is right in this vein of its argument, it would logically follow that this Court should also withdraw its decisions in the *Silverman*, *Clinton*, *Osborn* and *Berger* cases; not to mention, indeed, also the *Nardone* cases, the *Benanti* case, and *Lee v. Florida*.<sup>\*</sup> In fact, best of all for the gratification of this vein of the Government's argument, there ought to be a constitutional amendment doing away altogether with the Fourth Amendment, and preferably also the Fifth and Ninth Amendments (cf. our last preceding footnote). What we are endeavoring to suggest in thus pointing up the rule-or-ruin constitutional logic of the Government's position in this case is that, once discourse in an area of fundamental constitutional principle slips away from

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<sup>\*</sup> We do not undertake to explore in this connection the problem of how the Government would have to go about obtaining a withdrawal also of 47 U.S.C. § 605 from the Federal statute books. Perhaps the Government's zealous prosecutive spokesmen could put their energies to work on trying for a constitutional amendment for this purpose.

*principle* into the *ad hoc* level of discourse, that is the end not only of *logical* constitutional discourse but of any worthwhile constitutional discourse at all. For, what then happens is that we plunge into the abyss of that most total of all tragedies of polity to which human societies are prone, the abyss and tragedy from which the Anglo-American peoples long ago thought they had rendered themselves safe — A Government Of Men-Not Of Laws. It is anguishing that at this day, because of a litigation like this one, we should have to remind ourselves of the sheer historical decisiveness of the Battle which mankind won when Anglo-American political society adopted as its prime organizing principle the idea of A Government Of Laws And Not Of Men. History teaches that in A Government Of Laws And Not Of Men it needs but a small, incipient, infecting cell to doom the body politic. More vulnerable than is any physiological organism to the irreversible ravages of literal clinical cancer is the body politic of a free nation to the irreversible destructiveness of those seemingly mere *ad hoc* incidents by which Government falls under the final arbitrament of Men instead of remaining steadfastly under the reviewable power of Law.

*Second*, we are respectfully obliged to ask the Court to consider whether its own formulations of the *ad hoc* approach in the cases commencing with *Linkletter*, give too much hostage to constitutional fortune in light of the danger intrinsically raised against the safety of A Government Of Laws And Not Of Men by *ad hoc* decisional rules. Threats to this safety when offered by the Government as a litigant are matters which courts can repel. But we respectfully think that there also is danger in this regard already lodged in our constitutional fabric by this Court's *Linkletter et*



*post* decisions. Even the endemic zealotry of the prosecutive species would not have been likely to produce on the part of our adversaries in this case such feverishness and choler of prosecutive policy, had the Government not been emboldened by the apparent authority of the *ad hoc* doctrinal elements in the cases from *Linkletter* on. As we proposed in our main brief (pp. 58, 64), the Court may now wish to reconsider its entire recent doctrinal course on the subject of retroactivity *versus* prospectivity in applying changes of constitutional standards in criminal cases.\* The Govern-

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\* We realize that such a broad change of decisional course would of itself pose serious problems of judicial administration through the problems that would arise from a new "retroactive" modification of the *Linkletter et post* cases themselves. Our own case does not require the raising up of this larger forbidding prospect, as ours is a case still pending on direct review at the time of the decision in *Katz*. Still, it may not be amiss to say the following further words about such larger forbidding prospects which might portend from a major modification of *Linkletter et post*:—Under our system of law and constitutional values the *summum bonum* is constitutional justice, not the avoidance of even major practical inconveniences at the expense of constitutional justice. Furthermore, if the Court should accept, whether in this case or in some other case where larger doctrinal considerations may be more directly presented issue-wise than here (our case, again, being decideable on the narrower basis that it is a case still pending on direct review in relation to the applicable rule-changing decision (*Katz*)), the argument of our main brief (pp. 57-65) that in Austinian terms the United States Constitution, being *legislation*, speaks from the time of its own outset rather than from the later time of a judicial decision merely *reinterpreting* the Constitution, the Court (and the prosecutive establishments of the country) would really have no choice but to incur those larger prospects of practical administrative inconvenience, "if this country and its Constitution are to continue to be accepted at their professed value and good faith in the eyes of the world. If this Court should decide that, in the larger senses here suggested, it has been wrong in *Linkletter et post*, the rendering of such a decision and the stoical surmounting of the aftermath inconveniences (undoubtedly major as those inconveniences would be), would write a new page of bright honor in this country's constitutional history. We are sure that this Court does not feel serene about the present posture of this branch of our constitutional law.

ment in its brief herein says nothing about this possibility proposed by us for a major doctrinal revision of the retroactivity-prospectivity rules. It is understandable that the Government is content with the present posture of the law of this subject under *Linkletter et post*. But our main brief does present argument for changing this posture, and we therefore consider it proper to mention that the Government is silent on this subject. We go further, we *emphasize* this silence of the Government because we think that that silence may reveal a basic unease of mind on the part of our adversaries, whom we know to be notably conscientious and cultured lawyers.\* In our last preceding footnote we ventured to suggest that this Court itself may not feel serene about the present posture of its retroactivity-prospectivity case law. In all respectfulness, we suggest that, notwithstanding the extensive supporting discussion which the Court has devoted to the problem of retroactivity-prospectivity in *Linkletter* and in the later cases, it will not be a hesitant conclusion for future constitutional historians that, considered realistically, this whole recent shift away from retroactivity, came about as a practically felt necessity to cope with the anticipated consequences of the *Mapp* case in the first instance (*Linkletter*), followed by like practical responses to the subsequent decisions which so beneficially affected constitutional justice in criminal law enforcement both state and federal after *Mapp*. In other words, what the future constitutional historian will pretty plainly see is that, in the 1960's the highest Court of the great North American democratic society undertook the task of making effective several of the major constitutional

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\* This expression of respect for our opposing brothers is not inconsistent with our references *supra* to their zeal.

principles of civilized humaneness in criminal law enforcement; that in carrying out this task that Court was understandably troubled by the problem of the undoing of large numbers of previously rendered final judgments of criminal conviction if the newly announced rules were to apply to those past cases; that this potential unsettling of past cases appeared especially disturbing in its impact on the *status quo* in the fifty separate subordinate but semi-autonomous federalized sovereignties of that great North American republic; that, also, owing to various other grave disturbing tensions of that society during that era, tensions which handicapped calm understanding among the people as to the aims and efforts of its high Court, the wise men of that Court may have thought it best not to press too much the country's tolerance of the new civilizing rules; that, unfortunately also, the Government police officialdom of that era did not unanimously by any means welcome these civilizing improvements in the treatment of persons accused of crime, and instead many of these officials proclaimed that the high Court was evilly trying to impose more civilized rules on other branches of the Government, whose interest consisted in not becoming more civilized, lest if they were forced to become more civilized as the high Court wished they could no longer vouch for the future safety of the Republic, and so these Government officials opposed the civilizing influence of the high Court on the ground that some forms of governmental barbarism were inalienably needed to insure civilized order in the Republic; that to many of the people of that era (and to their politicians) the wishes expressed by police officials were sacred, because the former sacerdotal religions of that era had been largely supplanted by a religion worshipping manifold forms of punitive and aveng-

ing physical power, among whose chief priests and most revered spokesmen were the police officials who cursed the civilizing efforts of the high Court; that so, for all of these sad reasons, the wise and good men of the high Court decided that henceforth they would only try to civilize the people of that country and their police priesthood by forgiving all uncivilized injustices perpetrated against criminals except those which had not yet taken place, that in the meanwhile the still suffering victims of all such injustices which had already taken place would be sacrificed to the wrath of the people and their police priesthood; and that those wise and good men of the high Court hoped that by appeasing the wrath in this way, the country would accept in each instance the new civilizing rules handed down by the Court. Such is our respectfully submitted parable of the observations of a future legal historian. The parable is unfinished. This present case may weigh heavily in determining how the parable shall be finished.

*Third*, the Government's entire discussion of the *Katz*-retroactivity issue proceeds then, on the apparent premise that there is no occasion in this case to consider *de novo* the underlying constitutional question of general retroactivity.\* Perhaps it is for this reason—the Government's narrow view of the issue—that the Government has refrained from full discussion of our themes as to the impact of John

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\* Again, we of course would agree that there is no occasion to discuss this broader issue of general retroactivity if the Court decides in our favor on a basis of our case's being one still pending on direct review at the time *Katz* was decided; or if the decision on retroactivity falls in our favor here on the basis that our case meets the tests of *Linkletter et post* (integrity of the guilt-finding process, police deterrence, etc.). Otherwise, the broader issue of general retroactivity is necessarily in the case and we respectfully go on urging it.



Austin's philosophy and as to the Constitution's character as *legislation* which speaks from its outset rather than from the day when a Court interprets it (G. Br. 23, fn. 8; Pet. Br. 57-65).<sup>\*</sup> The Government's discussion of our John Austin theme consists only of a declination "to debate the point" and a quotation from Mr. Justice Cardozo's book, *The Nature Of The Judicial Process* (G. Br. 23, fn. 8). We note that Mr. Justice Cardozo concluded his listing of relevant factors—for determining retroactivity *vel non*—with the factor of "the deepest sentiments of justice" (*ibid*). And as regards Mr. Justice Cardozo's disparaging references to "metaphysical conceptions of the nature of judge-made law" and "the fetish of some implacable tenet, such as that of the division of governmental powers" (*ibid*), we ask:—Is it "metaphysical" that we are a constitutional democracy, a governmental society of constitutional limitations, a Government Of Laws And Not Of Men, a legal order under the Constitution which is ultimately the *legislative* enactment of the popular sovereign and which demands to be allowed to operate *truly prospectively*, i.e., not merely from the date of an interpreting pronouncement of a Court? Is it "metaphysical" or a "fetish" to maintain that under the name of judicially declared "prospectivity" for the *legislative* commands of the Constitution itself, we are at present experiencing in this country (under *Linkletter et post*) a *retroactive* negation of the Constitution itself? Is it "metaphysical" or "fetish" to protest that, in the face of this primal *legislative* character of the sovereign-declared Constitution, it is wrong to conclude that "the Constitution

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<sup>\*</sup> As to the latter theme the Government's brief is entirely silent; the Government does discuss, but only very briefly (see our text immediately following the above), the theme concerning John Austin.



neither prohibits nor requires retrospective effect" (*Linkletter v. Walker*, 381 U.S. 618 at 629) !\*

## B. The Government's Over-Simplification Of The Factor Of The Integrity Of The Guilt-Finding Process

We have all heard it said many times that our judicial system for the trial of issues of fact does not aspire to assure in each case the ascertainment of philosophically absolute truth, but that this system is the least imperfect system that men have been able to evolve for the purpose. We do not have absolute truth-declarers in our free society, and we do not want such absolutism.

When one is remitted to using, in important matters, a least imperfect instrumentality because a perfect one does not exist, one tries to set up as many safeguards as possible to minimize error and trouble from the use of the imperfect instrument. This is what has been done, in evolving our system of judicial proof; and special care to supply safeguards is taken in criminal cases.

Our system of judicial proof of facts, then, cannot be understood, indeed it could not be accepted, without its various safeguards. We say *various* safeguards because not all of the safeguards go directly to assist in the ascertaining of the factual truth as such—the chief examples of safeguards of the latter class are the rules of evidence, the insistence that the trier of the facts be fair and impartial, and the right to adversary assistance of trained counsel.

\* As mentioned in our last preceding footnote, *supra*, the Government's brief does not discuss at all this theme of the legislative character of the Constitution.

Less directly, but not less importantly, safeguarding the judicial fact-trying process are other standards and restrictions such as the privilege against self-incrimination, the guarantee against involuntary confessions, and the protections of individual right against unreasonable methods of investigation.

Who shall say, with any hope of analytical rightness, much less rightness in terms of ultimate constitutional values, that one or another of these last-mentioned collateral safeguards is *generically* not important enough for the integrity of the fact-finding process to justify treating it as a part of that process in the quest for proper standards of retroactivity? True, this Court has undertaken to delineate these matters, in *Linkletter et post*. But we think everyone senses that the situation remains profoundly unsatisfying not only to the general sense of justice but also to the specific sense of when and under what circumstances the judicial fact-trying process (the integrity of the guilt-finding process) is working "least imperfectly".

We submit that over-simplification of the vital (i.e., literally life-giving) complexities in this area of the law is extremely dangerous to our whole structure of constitutional government. We submit that the present retroactivity-prospectivity doctrines of *Linkletter et post*, by over-simplifying and artificializing the problem of the integrity of the guilt-finding process, tend towards a dangerous blurring of the various lines of constitutional safeguard in our judicial fact-trying process. The search for "integrity" of the guilt-finding process cannot achieve its "least imperfect" goals without constant recognition also of the *intricacy* of the guilt-finding process. And an indis-

pensable element in those intricate arrangements is the inter-playing safeguards afforded by Fourth Amendment privacy and Fifth Amendment freedom from self-incrimination.

**C. Additional Points Urged in Petitioners' Main Brief Which We Consider Important on the Katz-Retroactivity Issue But Which The Government Has Not Answered**

1. The Government's brief makes no mention of our reliance on the Ninth Amendment as affording a distinct ground for reversal, this ground not being dependent on *Katz* because *Katz* does not rest on the Ninth Amendment (Pet. Br., 86-87).

2. The Government's brief does not mention our argument that, in the event we are given retroactivity under *Katz*, this case will not further burden the administration of justice because the electronic taint is so pervasive as to make remand unnecessary and retrial impossible (Pet. Br., 70-71). It seems fair to construe the Government's silence on this point as lending agreement.

3. The Government's brief does not mention our argument at page 66 of our main brief which read as follows:

*"We think it may be especially important to note that when the Court in Johnson (supra) said the particular provision of the Constitution involved is not necessarily determinative, all that the Court apparently meant was that a choice for or against retroactivity would not necessarily favor one provision of the Constitution as against another; but we do not think the Court meant that in different cases involving the same provision of the Constitution differing results as to retroactivity might be proper."* (Italics in original)

Our above quoted argument, to which the Government has not replied, referred to *Johnson v. New Jersey*, 384 U.S. 719 at 728, and to the fact that *Mapp-Linkletter*, where retroactivity was allowed for cases still pending on direct review at the time of the *Mapp* decision, involved the Fourth Amendment, as do *Katz* and our case. Therefore, while retroactivity or partial retroactivity for a Fourth Amendment case does not necessarily (under *Johnson*) denote retroactivity for cases involving any other particular provision of the Constitution, *Johnson* is entirely consistent with allowing retroactivity uniformly in Fourth Amendment cases at least to the extent allowed *via Mapp-Linkletter*, i.e. cases still pending on direct review when *Katz* was decided.

4. The Government's brief does not mention our argument (Pet. Br., 81-82) that *Johnson, supra*, preserved for possible retroactive protection situations involving questions of voluntariness of statements taken from accused persons, that electronic eavesdropping intrinsically "seizes" involuntary self-incriminating words, and that the rejection of the "mere evidence" rule in *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 302-303 reserved the Fourth Amendment issue as to items of a "testimonial" or "communicative" nature or "of evidential value whose very nature precludes them from being the object of a reasonable search and seizure" in violation of the Fifth Amendment self-incrimination clause. See also, again, our quotation earlier herein from *Lee v. Florida*, consisting of language quoted by the Court from the *Nardone* case where the Fourth-Fifth Amendment interplay was adduced as relevant to electronic eavesdropping (there telephone wire tapping).

# **D. Retroactivity Case Law Developments Since The Time Of Filing Of Petitioners' Opening Brief**

1. We did mention in our opening brief (p. 89), that on April 22, 1968 certiorari has been granted in *Kaiser v. New York*, October Term 1957, No. 1451 Misc., presenting the issue of retroactivity of *Berger v. New York*, 388 U.S. 41.\* This occurred on the eve of the filing of our opening brief, and we would now submit further as follows concerning the *Kaiser* certiorari:—In deciding the retroactivity issues presented by *Kaiser*, this Court will be called upon to consider, *inter alia*, the ruling of the New York Court of Appeals in that case (*People v. Kaiser*, 21 N.Y. 2d 92, 98, 286 N.Y.S. 2d 801) that not only would *Berger* be given only prospective effect, but that this prospectivity would operate only from the time of investigative activities occurring after the date of the decision in *Berger*. This, the most extreme form of prospectivity, is the same as that adopted in *Stovall v. Denno*, 388 U.S. 293 at 296. *Kaiser* seems likely, then, to involve examination of the applicability of the extreme *Stovall* rule to Fourth Amendment cases. At page 48 of its brief herein the Government grandly concludes that, "Thus, in the evolution of the doctrine of non-retroactivity, *Stovall* reflects the Court's determination that hereafter prospectivity of application, where appropriate at all, means application to future conduct violative of the rule announced". We take it that any such finale remains to be seen, after decision of the present case and of *Kaiser*.

2. In *Roberts v. Russell*, — U.S. —, 20 L. Ed 2d 1100, the Court gave full retroactivity to *Bruton v. United States*;

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\* *Kaiser* was decided by the New York Court of Appeals a few days prior to this Court's decision in *Katz*. We assume that the *Kaiser* certiorari will involve the retroactivity question not only as to *Berger* but as to the latter with the gloss of *Katz*.



391 U.S. 20 L. Ed 2d 476, as involving "serious flaws in the fact-finding process at the trial" (admission at a joint trial of a defendant's extrajudicial confession implicating a co-defendant). *Bruton, supra*, had overruled *Delli Paoli v. United States*, 352 U.S. 232. Of special interest for our case, in the decision in *Roberts v. Russell, supra*, was the Court's observation that "*Delli Paoli* has been under attack from its inception and many Courts have in fact rejected it". We submit that this language assists our argument here that electronic snooping of allegedly non trespassory types had "been under attack" for a long time.

3. *De Stefano v. Woods*, — U.S. —, 20 L. Ed. 2d 1308, made the new state jury trial requirements of *Duncan v. Louisiana*, — U.S. —, 20 L. Ed. 2d 491, and *Bloom v. Illinois*, — U.S. —, 20 L. Ed. 2d 522, prospectively applicable only to trials begun after the date of the *Duncan* and *Bloom* decisions. We do not perceive anything in the facts or in the Court's reasoning in *De Stefano* which would necessarily make that case controlling for the distinct situation in our case—except that the Court did in *De Stefano* reiterate its *Stovall* observation that "We see no basis for a distinction between convictions that have become final and cases at various stages of trial and appeal" (20 L. Ed 2d at 1312, fn. 2). This latter language is, of course, against our position here seeking *Katz*-retroactivity on the basis that our case was still pending on direct review when *Katz* was decided. But our plea in this regard is supported, we believe, by unusually compelling considerations, viz., the acute interconnections of time between the progress of our case and the *Katz* case, respectively.

4. In *McConnell v. Rhay* and *Stiltner v. Rhay*, October Term 1968, 87 Misc. and 458 Misc., decided October 15, 1968,

37 U.S. Law Week 3131, the Court gave full retroactivity to *Mempa v. Rhay*, 389 U.S. 128 (assistance of counsel at proceedings for revocation of probation).

5. In *Koran v. State*, decided August 20, 1968 by the Florida Court of Appeals, 3 Criminal Law Reporter 2464, there is an apparent dictum that *Katz* is not retroactive. The profundity of the reasoning in this *Koran* decision is illustrated by the further remark of the Florida Court of Appeals that "there has been no adjudication that *Katz* applies in State Courts" (*ibid.*). Cf. this Court's recent rejection of a similar suggestion of the Florida Supreme Court (regarding the applicability in Florida of 47 U.S.C. § 605). *Lee v. Florida*, — U.S. —, 20 L. Ed 2d at 1169-1170.

6. In *Dancy v. United States*, 390 F. 2d 370 (C.A. 5, 1968) and *Handsford v. United States*, 390 F. 2d 373 (C.A. 5, 1968), cert. denied in *Handsford*, — U.S. —, 20 L. Ed 2d 654,\* Circuit Judge Charles Fahy, dissenting, would have held *Katz* applicable to an informer-minifon type of surveillance, and Judge Fahy apparently assumed that *Katz* would be retroactive if thus applicable.

## II. The Issues As To Legality Of The Waldorf Astoria Eavesdropping Under Pre-Katz Standards

There has arisen, in the parties' briefs herein, an unfortunate difference in the way that we and the Government read the record testimony of the Waldorf Astoria pretrial suppression hearing. Lest the Court think that we are careless in handling record materials for briefing purposes, and because it is necessary to answer some important misread-

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\* Decided before we filed our main brief but not then reported.

ings of the record which appear in the Government's brief, we are reluctantly obliged to treat these differences in some detail:—

It will be recalled that in the pretrial suppression hearing before Judge Palmieri narcotics agent Durham testified about his setting up of the eavesdropping equipment in Nebbia's room at the Waldorf Astoria on December 14, 1965; that narcotics agent Kiere, who ran the equipment, testified; and that several other agents (*infra*) testified.

In our main brief, in support of our contention that the agents' testimony was unsatisfying in credibility as to what installation was actually used to bug Nebbia's room, we noted technical electronic incongruities in the equipment itself as described by Durham, incongruities in the operation of the equipment by Kiere (absence of background noises which should have been audible on the tapes, if as claimed the installation was inside the agents' own room), suspicious circumstances in connection with the opening of a door leading to the narrow air space between the agents' room and Nebbia's room, and the testimony of one agent (Weinberg) apparently negating that there had been any such electronic installation as claimed inside the agents' own room (Pet. Br. 89-105).

Let us examine the Government's answer to our above points.

The Government flatly states that "there is nothing in the record to support" Petitioner's contention "that discrepancies appear when the testimony of the various agents is compared, and that the question thus arises 'whether the agents told the truth at all' " (Gr. Br. 54). The Government then alludes in its brief to our use of testimony concerning

the opening of the door on the agents' side of the connecting doorway between the two rooms, and the Government rejects our reliance on the record, stating, "While petitioners seek to suggest that the testimony was contradictory and evasive, the record references set forth in their argument fail to support either their specific or their general contentions" (Gr. Br. 54-55). The portion of our brief to which the Government is here apparently referring is pages 100-102. Let us see what the record shows, and let us do this by analyzing the following statement in the Government's brief with its record references (G. Br. 55).

"\* \* \* The record of the hearing, specifically including the portions cited by petitioners, shows that only the door which opened from the agents' room was opened; that that door was opened only once, immediately after agents Kiere, Smith, Weinberg, and Klempner first entered the room; that it was closed a minute or so later; and that the existence of the second door was later related to agent Durham after he arrived at the hotel with the electronic surveillance equipment (R. 3404, 3415, 3417, 3438, 3510-3512, 3524-3528, 3748-3749, 3758)."

\* "Agent Durham's absence when the door was opened of course explains why he testified that he never saw the door opened, contrary to petitioners' intimation that his statement in this respect is contradictory and suspicious (see Pet. Br. 100-102)."

For the purpose of determining the accuracy of the Government's above summary and record references in support thereof we have re-studied the entirety of the Waldorf-Astoria suppression testimony, and we are sure that the following is an accurate and fair compendium on the points put in issue by the Government in the above quotation from the Government's brief:—

Durham testified that he set up the equipment in the agents' room at the Waldorf-Astoria "some time about 4:00 p.m.", "latter part of the afternoon", on December 14, 1965 (R. 3394). Durham could not remember whether narcotics agent *Smith was there when Durham arrived* or came in after Durham (R. 3396). Durham set up the equipment within a relatively short period of time (R. 3396). Durham was pervasively vague and unable to recall definitely as to the presence of other agents (R. 3396-3398, 3407-3209). Durham said when he arrived in the agents' room on December 14, agent Kiere told him that there was a connecting door to Nebbia's room (R. 3404); Durham "assumed" this door opened into Nebbia's room (ibid); a few pages later Durham testified that "some time shortly after my arrival" ("about 4:00 o'clock") Kiere told him there were two doors (R. 3415-3416). Durham claimed complete ignorance as to the physical set up of these doors and of the air space in between (R. 3417-3419, 3422-3423).

Agent Kiere testified that he first came to the agents' room at the Waldorf-Astoria about 2:00 p.m. on December 14, with agents Smith and Mangiaracina (R. 3426-3427). *Kiere said that Durham arrived "approximately 20 minutes to a half hour" after Kiere* (R. 3428). Kiere was not asked and did not state anything about having told Durham about the door; *in fact Kiere professed having been practically unaware of Durham's presence or activities in the room that afternoon* (R. 3435). Nevertheless, when at R. 3438 Kiere was asked whether he himself had opened the door on the agents' said and "when was that done", Kiere gratuitously answered the question of "when" with the words "*before M. Durham's arrival*". (*Nobody had asked Kiere to correlate the time of his opening of the door with the time of*



*Durham's arrival; Kiere volunteered this, and we respectfully deem this item extremely suspicious.)*

Mr. Whiteman, of the Waldorf Astoria management, swore that he had never entered the agents' room while they were in it (R. 3464).

Agent Smith testified that when he first went to the Waldorf Astoria on December 14 he was accompanied by agents Kiere, Weinberg, and "I think Joseph Klempner, possibly Norris Durham or he met me there later, I am not sure" (R. 3505). Similarly at R. 3508-3509 when Smith was asked whether the agents at that juncture had any electronic equipment with them, he said "I don't recall if agent Durham was with me when we went into the room or he arrived *shortly later*, thereafter, and he had electronic equipment" (R. 3508-3509). ( Smith was very specific about the time when he arrived at the Waldorf Astoria to engage a room for the agents, "it was after 2:00 p.m.\*\*\* shortly after, 2:30 p.m. 3:00 o'clock" (R. 3505-3506). Smith said they got to the agents' room at the hotel "somewhere around" 3:00 p.m. (R. 3508). At R. 3509-3512 Smith said that he opened the door on the agents' side and put his ear against Nebbia's door, but at R. 3524 he said that someone else opened it, he did not recall who, it was done in his presence. Also, at R. 3524-3525 Smith said that present when the door was opened were Kiere, Weinberg, "*Durham, I believe*", and Klempner. At R. 3529-3530 Smith was again asked whether at the time he arrived with the several other agents at the Waldorf Astoria on December 14 any of them had electronic equipment, and he said "I couldn't be sure of that. I don't know if agent Durham was with me at the time we first went into the room or he arrived *a short time*

*later*, and he had the electronic equipment.\*\*\* I don't recall if he went into the room with us or arrived *a few minutes later*." Smith said the door was opened "I think as soon as I went in the room, almost immediately after I got in (R. 3531-3532).

Agent Klempner did not recall what time he got to the hotel on December 14 (R. 3747, 3754). He was also unable to recall just which other agents were with him (R. 3747-3748). Especially interesting is Klempner's testimony that when the door on the agents' side leading to the air space was opened "there was somebody who was in some way connected with the hotel in the room when it was opened" (R. 3748-3749); this is interesting because the hotel official, Whiteman, swore he was never in the agents' room, *supra*. Klempner did not recall the time juncture at which the door was opened, "I think it was sometime during that day" (R. 3749); and Klempner never say anyone put his ear to Nebbia's door (*ibid*). (*This last suggests that the door leading to the air space of Nebbia's room was opened more than once*, since Smith's testimony (*supra*) is explicit that he put his ear against the Nebbia door, so if Klempner was present at the door opening when no one put his ear to the door, must it not have been a door opening separate from the one described by Smith? It is true also that Klempner said "I was not really paying too much attention to what was being done at that moment", but we may be pardoned, we hope, for not being overwhelmingly convinced by such repeated claims of these trained narcotic agents—compare Kiere's similar claim of not really having paid much attention to Durham and to the installation of the equipment—that they were just a bunch of sleepy-eyed country boys when the most crucial happenings relating to the trespass

*vel non* character of the Waldorf Astoria eavesdropping were taking place.\*)

Agent Weinberg testified that he went to the Waldorf "Astoria" in the early part of the afternoon on December 14 with agents Klempner, Smith and Kiere (R. 3769). He stayed in the agents' room about 15 minutes, and during that time the door in question was not opened; nor was it ever opened in Weinberg's presence; when Weinberg first left the room after the initial 15 minutes, he returned again about a half an hour or an hour later, stayed just a few minutes, and did not return to the room again that day, but the last time he was in the room that day was about 5:00 p.m. (R. 3771-3773, 3775). Weinberg did not see Durham in the room during those first 15 minutes on December 14 (R. 3771). Weinberg saw no electronic equipment of any kind in the room on December 14 (R. 3771-3777).

From the above testimony it is evident that the Government's statements at page 55 of its brief, quoted *supra*, concerning the opening of the door are incorrect or questionable in practically every significant detail. The hopelessly (and suspiciously) conflicting and often evasive testimony does not remotely approach proof beyond a reasonable doubt\*\*, or even a preponderance, that the door was opened only once, or that it was opened "*immediately*" after agents Kiere, Smith, Weinberg and Klempner first entered the

\* The situation brings to mind Edward Gibbon's classic understatement, "A melancholy doubt obtrudes itself upon the reluctant mind"; we have had occasion previously in our papers herein to refer to Gibbon's witticism (see the Appendix to our opening brief herein, at p. A 32).

\*\* Cf. the recent opinion of District Judge Weinstein, E.D.N.Y., in *United States v. Schipani*, July 26, 1968, reported in 3 Criminal Law Reporter 2425, setting the standard of proof beyond a reasonable doubt to negate electronic taint where there has been admitted eavesdropping.

room", or that Durham learned of the opening of the door only from hearing about it from others and was not himself present at the time.

Similarly, we must dispute the Government's flat statement that "there is no basis for petitioners' related contention, that the testimony as to the location of the electronic installation is impugned by agent Weinberg 'who swore that he had seen no electronic apparatus in the agents' room at all' " (G.Br. 55). On re-studying the Weinberg testimony we find that we were wrong in making the unqualified statement just quoted, but that the Government has fallen into a seriously misleading description of that testimony at pages 55-56 of its brief, where, according to the Government's description, Weinberg saw practically the whole equipment. The entirety of Weinberg's testimony appears at R. 3769-3777. His testimony, relating to this phase, is that he saw no electronic equipment in the agents' room at any time on December 14, and that he was there as late as 5:00 p.m.—by which time Durham's alleged installation must have been long completed. The only thing Weinberg ever did see in the room in the way of electronic equipment was (1) a tape recorder, but "it was during the course of one of the days, I don't recall exactly when" (R. 3773) and, again, he was positive that he had not seen this or any other electronic equipment on December 14 (R. 3775); and (2) he also saw a towel with a wire leading from it, but "I don't believe I saw it on the 14th" (R. 3774).

Returning to the subject of the opening of the door to Nebbia's air space between the two rooms, we respectfully emphasize that manifestly this was done to aid the agents in working out their method for installation of the

microphone; and this is true whether Durham participated at the opening of the door and the inspection of the air space, or whether as the Government claims it was later "related" to him by the other agents. This incident of indubitable trespass, committed as a deliberate step in the setting up of the electronic installation, taken together with the clearly unauthorized (by Nebbia) use of his right in the common appurtenance of the hotel electric current, are sufficient to work a violation of the pre-*Katz* standards.

We note also, as to the matter of the hotel management's secret connivance against Nebbia, that in *Lee v. Florida*, U.S. , 20 L.Ed 2d 1166, 1169 at fn. 3, the Court expressly remarked that "the record does not show how or why this house [used by the wire-tapping police officers next-door to the defendant's house] was made available to the police".

Finally on this subject of the pre-*Katz* standards in relation to the Waldorf-Astoria bugging, we note that the Government still apparently declines to disclose the contents of President Johnson's order or policy directive of June 30, 1965 (G. Br. 57-58, fn. 36).

### **III. The determinations by both courts below that there was no other electronics eavesdropping materially affecting this case.**

1. The Government's brief does not mention our contention at page 112, fn., of our main brief, that if the Government had disclosed the Georgia car bugging before or during the trial we could not have been denied the plenary inquiry which was denied to us in the post-trial proceedings.



2. Nor has the Government specifically answered our argument in our main brief (pages A78-79, A86) that in view of the unsatisfactory posture of the documentary and other disclosures by the Narcotics Bureau concerning the Georgia car bugging, we should have been granted a plenary inquiry into all relevant files of the Narcotics Bureau or other agencies if necessary. The Government's treatment of this general subject in its brief at page 63 does not meet this contention of ours.

3. Nor has the Government answered our contention (Pet. Br. 7) that in regard to the Georgia car bug no Government witness took the stand to deny the testimony of our witness Kennington that one or more narcotics agent boasted in Kennington's presence that they had a transmitter in Nebbia's car and had "gotten good information" (Pet. Br. A76).

## CONCLUSION

It is respectfully submitted that the relief prayed in the conclusion to our opening brief should be granted.

Respectfully submitted,

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NOV 8 1968

IN THE  
**Supreme Court of the United States**  
 OCTOBER TERM, 1968

JOHN F. DAVIS, CLERK

**No. 12**

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC,  
 JEAN NEBBIA and ANTHONY SUTERA,

*Petitioners,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT  
 OF APPEALS FOR THE SECOND CIRCUIT

**JOINT SUPPLEMENTAL REPLY BRIEF  
 FOR PETITIONERS**

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IN THE  
**Supreme Court of the United States**

**October Term, 1968**

**No. 12**

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**SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC,  
JEAN NEBBIA and ANTHONY SUTERA,**

*Petitioners,*

**—against—**

**UNITED STATES OF AMERICA,**

*Respondent.*

---

**JOINT SUPPLEMENTAL REPLY BRIEF  
FOR PETITIONERS**

---

**Introductory**

Petitioners have previously filed a timely joint reply brief. Oral argument on this case was postponed from the week of October 21, 1968, to November 12, owing to illness of Government counsel. The Clerk advised us of this postponement by telephone on October 21. Later that week we telephoned the Clerk to ask whether, in view of the postponement of the argument to November 12, we might properly submit a supplemental reply brief which we stated we planned to do by that weekend or early in the week of October 28, and the Clerk's office instructed that such supplemental reply brief should be served and filed as soon as possible. Then on October 28 the Court decided *Fuller v. Alaska*, No. 249, 37 U.S. Law Week 3157. The short report of the *Fuller* decision in the New York Times on the night

of October 28-29 alerted us that the retroactivity problem in our case (concerning *Katz v. United States*, 389 U.S. 347) might be substantially affected by the non-retroactivity ruling of *Fuller, supra* (relating to *Lee v. Florida*, 392 U.S. 378). We did not receive in the mail until October 31 our *U.S. Law Week* and our *Criminal Law Reporter* issues containing the text of the *Fuller* decision. This supplemental reply brief is being finished for transmittal to our printer today, November 7, which is just one week since we received our copies of the *Fuller* decision, and this supplemental reply brief will be filed and personally served by messenger in Washington tomorrow, November 8, which is four days before the oral argument presently scheduled for November 12. Rule 41(3) allows filing of reply briefs "up to three days before the case is called for hearing". Since this is a *supplemental* reply brief, i.e., since we have already filed one reply brief, and since as aforesaid we had previously promised the Clerk (before *Fuller* came down) that we would submit our supplemental reply brief early in the week of October 28, we are concerned to justify the delay in the filing of this supplemental reply brief, hence the foregoing detailed explanation. We trust that the Court will take into consideration the quite possibly major impact of the *Fuller* decision on the retroactivity problems of our case and that our presentation in this supplemental reply brief aims at thorough coverage of the new subject matter so very recently brought into the picture by the *Fuller* decision.\*

\* \* \* \* \*

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\* We note also that the October 28 action of the Court in deciding *Fuller* on the merits, occurred by *per curiam* ruling without prior granting of certiorari or scheduling of argument, which would sooner have alerted the Bar that *Fuller* might be of imminent decisional significance.

This supplemental reply brief will also treat a topic which would have been the sole subject matter of this supplemental reply brief before the intervening decision in *Fuller* came down (see II, *infra*).

### **I. The effect of *Fuller v. Alaska*, No. 249, on the *Katz* retroactivity issues.**

The *Fuller* decision, *supra* (October 28, 1968), holding that *Lee v. Florida*, 392 U.S. 378, is to be applied only to state criminal trials in which evidence violative of 47 U.S.C. §605 is sought to be introduced after the date of the decision in *Lee*, contains reasoning and has connotations which, we realize, are arguably unfavorable to our position that *Katz v. United States*, 389 U.S. 347, should be held applicable to our case.

Let us first summarize what we think are the salient items in the *Fuller* decision, in relation to the *Lee* decision; as part of the following summary we shall quote the main reasoning portion of *Fuller*; after finishing this summary and quotation *re Fuller*, we shall take up in more detail the several points which need extended discussion.

*Lee* involved a form of telephone wiretapping—an installation for intercepting conversations on a party-line telephone—and the Court there held that this violated §605, the Court overruling *Schwartz v. Texas*, 344 U.S. 199.

*Fuller* involved introduction in evidence of a telegram allegedly sent by petitioner Fuller to an accomplice.\* *Fuller*

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\* We indicate in detail, *infra*, that this Court's decision in *Fuller* is silent as to any of the factual circumstances concerning the prosecution's obtaining of this telegram, and we supply *infra* facts relating thereto which we think are relevant for present purposes.



apparently treats the *telephone* wiretapping in *Lee* and the *telegram* incident in *Fuller* as calling for no differentiation from the standpoint of §605.

Neither in *Lee* nor in *Fuller* did this Court rule on the question of whether State conduct in violation of §605 is also a violation of the Fourth Amendment. In *Lee* the Court expressly declined to reach the Fourth Amendment issues (as well as Fourteenth Amendment issues) (*Lee v. Florida*, 392 U.S. 378, , fn. 2, 20 L. Ed. 2d at 1169, fn. 2). In *Fuller* the Court did mention the Fourth Amendment, but only by way of an analogy concerning a policy aspect of *Mapp v. Ohio*, 367 U.S. 643 and *Linkletter v. Walker*, 381 U.S. 618, 639, i.e., the policy of exclusionary rulings "designed to enforce the Federal Law", the Court stating in *Fuller* that this policy was common to *Lee*, *Fuller*, *Mapp* and *Linkletter*; thus *Fuller's* references to the Fourth Amendment do not decisively change the fact that *Fuller* (also *Lee*) is grounded exclusively on §605, and not on the Fourth Amendment as such. See, *infra*, our argument that significant constitutional distinction derives, for the purposes of the retroactivity-prospectivity problem, from the fact that our case is a Federal and a Fourth Amendment case, while *Lee* and *Fuller* are State and §605 cases.

The entirety of the reasoning of the Court in *Fuller* on the retroactivity-prospectivity question will be quoted (37 U.S. Law Week at 3158):

"Prospective application of *Lee* is supported by all of the considerations outlined in *Stovall v. Denno*, 338 U.S. 293, 297.<sup>1</sup> The purpose of *Lee* was in no sense "to enhance the reliability of the fact-finding process at trial." *Johnson v. New Jersey*, 384 U.S. 719, 729. Like *Mapp v. Ohio*, 367 U.S. 643, *Lee* was

designed to enforce the federal law.<sup>2</sup> *Linkletter v. Walker*, 381 U.S. 618, 639. And evidence seized in violation of the federal statute is no less relevant and reliable than that seized in violation of the Fourth Amendment to the Constitution. Moreover, the States have justifiably relied upon the explicit holding of *Schwartz* that such evidence was admissible.

Retroactive application of *Lee* would overturn every state conviction obtained in good-faith reliance on *Schwartz*. Since this result is not required by the principle upon which *Lee* was decided, or necessary to accomplish its purpose, we hold that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in *Lee*.

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<sup>1</sup> These considerations were more recently applied in *DeStafano v. Woods*, 392 U.S. 631, 633, in which we concluded that the right to a jury trial in state criminal prosecutions under *Duncan v. Louisiana*, 391 U.S. 145, and *Bloom v. Illinois*, 391 U.S. 194, was prospective only.

<sup>2</sup> *Lee v. Florida*, 392 U.S., at 386-387:

"We conclude, as we concluded in *Elkins* and in *Mapp*, that nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law "in the only effectively available way — by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S., at 217."

With the above summary and quotation of the *Fuller* decision in mind, let us now examine in more detail whether the *Fuller* prospectivity ruling concerning *Lee v. Florida*, is authority for a ruling that *Katz v. United States* should likewise be held to have only prospective effect either generally or for our case.

*First*, a preliminary word about the reasoning of the *Katz* decision itself: There are very strong indications in the *Katz* decision that, already built into the language of that decision, so to say, is the element of retroactivity. This

latter theme was indeed suggested by us in our opening brief (pp. 87-88), but we purposely did not elaborate this theme in our opening brief because, we reasoned to ourselves, it seemed that if the Court already itself considered *Katz* to require retroactivity the Court would not merely have granted certiorari in our case for argument of the retroactivity question but would have reversed and remanded the case upon the granting of the certiorari. Now, however, in the light of *Fuller v. Alaska* and, more particularly, in light of what we deem the several manifestly intrinsic differences between *Fuller-Lee* and the *Katz* type of situation, we think it is proper for us to present plenary argument in support of our above mentioned theme of the "built-in" retroactivity ruling contained in the *Katz* decision itself, the theme which until now we have not pressed with the benefit of full argument.

The item in the *Katz* decision which we cited in our opening brief (pp. 87-88) as denoting such "built in" retroactivity, was the Court's rejection in *Katz* of the Government's argument that because its agents had relied on *Olmstead v. United States*, 277 U.S. 438 and *Goldman v. United States*, 316 U.S. 129, the Court should retroactively validate the agents' conduct, the Court stating, "That we cannot do. . . . [T]he inescapable fact is that" the agents had chosen to decide for themselves, rather than presenting to "a neutral magistrate", the agents' claimed belief that they had probable cause to conduct their electronic activity.

It is strikingly pertinent to this last quoted language of the Court in *Katz*, that in the oral argument in this Court on October 14, 1968, in *Butenko v. United States*, No. 197, as reported in 4 *Criminal Law Reporter* 4053 (October 23, 1968, Vol. 4, No. 4, Section 4), the following described colloquy

took place between the Chief Justice and the Solicitor General:

"The Solicitor General commented that in *Katz*, the electronic eavesdropping was legal at the time it was done.

The Chief Justice noted that if that was true it would have been likely that the Supreme Court would have followed the precedent."

Further pursuing this same theme—of the "built in" retroactivity effect of the *Katz* decision itself—we would now recall to the Court that the *Katz* decision pervasively abounds, it is practically saturated, with items of ruling and reasoning which overwhelmingly bespeak that the Court in *Katz* conceived that essentially it was applying existing law of the Fourth Amendment, indeed that it was applying the single most vital Fourth Amendment principle, the very central axiom of the Fourth Amendment, long and unquestioningly assumed by everyone as being the heart of the Fourth Amendment, namely, the requirement of advance judicial approval for a search warrant. Except for the fact that *Katz* also did involve an express overruling at last of *Olmstead* and *Goldman, supra*, one may read the *Katz* decision in vain for any hint that the Court deemed itself to be laying down "new law"; and as to those overrulings, the *Katz* decision strongly articulates also that *Olmstead* and *Goldman* had long since lost their authority by erosion effected through a series of pre-*Katz* decisions incompatible with *Olmstead* and *Goldman*.

Thus, at 389 U.S. , 19 L. Ed. 2d 582-583, the Court in *Katz*, in rejecting the Government's test of "physical penetration", commented that this test "was at one time thought

to" be controlling (*italics added*). Similarly, at 389 U.S.

, 19 L. Ed. 2d 583 the Court, again speaking in a past sense of constitutionally established principle pre-dating *Katz*, stated that this test "has been discredited", citing *Warden v. Hayden*, 387 U.S. 294, 304. In similar vein, i.e., referring to the "penetration" or "trespass" tests as having lost authority pre-*Katz*, the Court said of the *Olmstead* case that "we have since departed from the narrow view on which that decision rested", and then the Court went on to quote the well known language from *Silverman v. United States*, 375 U.S. 505, 511, rejecting the test of "technical trespass under . . . local property law" (389 U.S. at , 19 L. Ed. 2d at 583). Still again, in this same vein, the Court referred in *Katz* (389 U.S. at , 19 L. Ed. 2d at 583) to the pre-*Katz* non-trespass standards by speaking of them as a pre-*Katz* accomplished decisional fact, the Court using the language "Once this much is acknowledged" in referring back to those pre-*Katz* development. Next, at 389 U.S. , 19 L. Ed. 2d at 583, the Court wrote the following words which, we submit, constitute the plainest possible speaking that so called non-trespassory electronic eavesdropping was violative of the Fourth Amendment pre-*Katz*:

"We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth



Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. \* \* \*

Immediately following the above quotation the Court in *Katz* went on to describe and consider the Government's position "that its agents acted in an entirely defensible manner" with respect to the above quoted question posed by the Court of "whether the search and seizure conducted in this case complied with constitutional standards" (389 U.S. at , 19 L. Ed. 2d at 583-584).\*

The thereafter immediately next following portion of the *Katz* decision (389 U.S. at , 19 L. Ed. 2d 584-585), is too lengthy to quote here, as it includes extended footnotes by the Court; we summarize: The Court reasoned that, assuming the Government's agents had so behaved that they could have obtained a judicial warrant within the meaning of the pre-*Katz* decisions (the Court citing *Berger v. New York*, 388 U.S. 41; *Osborn v. United States*, 385 U.S. 323; *Ker v. California*, 374 U.S. 23; *Lopez v. United States*,

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\* It deserves to be emphasized, we submit, that in the portions of the *Katz* decision above quoted and discussed, not only was the Court itself speaking of whether there had been compliance with "constitutional standards" plainly assumed to pre-date *Katz*, but also the Government in taking its litigational stand before this Court in *Katz* apparently found it appropriate to address itself to a showing that its agents had complied with pre-*Katz* standards that were not dependent on the "trespass" theory. We respectfully again emphasize, both this Court and the Government in *Katz* understood that one quite possible decisional direction portended by *Katz* was that this Court might well rule for petitioner *Katz* on the basis of pre-*Katz* non-trespass law; and in fact that was exactly what happened in *Katz* when the Court announced its decision (as we read the *Katz* case).

373 U.S. 427; *Nordelli v. United States*, 24 F. 2d 665), the conduct of the Government's agents nevertheless could not now be retroactively validated, for the reasons which we noted *supra*, viz., that there had been no advance scrutiny and approval by a judicial officer on the issue of probable cause. In this last mentioned portion of the *Katz* decision (see 389 U.S. at 19 L. Ed. 2d at 585) the Court's reasoning in *Katz* struck perhaps its strongest note (as we earlier suggested) of insistence upon the applicability of the long-established pre-*Katz* Fourth Amendment standards (advance judicial approval of search warrants). This retrospectively established posture of the Fourth Amendment principles which the Court evidently deemed applicable in *Katz* is vividly expressed, for example, by the following language of the Court in which the Court spoke plainly in terms of pre-existing (i.e., pre-*Katz*) law (389 U.S. at 19 L. Ed. 2d at 585):

“\* \* \* ‘Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes,’ *United States v. Jeffers*, 342 U.S. 48, 51, 96 L. Ed. 59, 64, 72 S. Ct. 93, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”

In the above quotation in *Katz* we see the Court using such expressions as that “over and again” the Fourth Amendment requirement of “adherence to judicial processes” had been “emphasized” by the Court long before *Katz*; and that, apparently, so securely and long established had this pre-*Katz* Fourth Amendment principle become, that searches in violation of this principle—which the Court was de-

claredly applying in *Katz* as a principle declaredly long pre-dating *Katz*—or searches of the *Katz* type in violation of this principle were “per se unreasonable under the Fourth Amendment” (see the quotation immediately above).

Also interesting in the *Katz* decision—with reference to our same above theme that *Katz* was decided on pre-*Katz* Fourth Amendment law—is the portion of the *Katz* decision which follows immediately after our last given quotation, *supra*. That quotation ended, as seen, with a reference to “well-delineated exceptions”, i.e., exceptions to the long-established Fourth Amendment principle requiring advance judicial approval for searches. The Court then went on (389 U.S. at , 19 L. Ed. 2d at 585-586) to point out that none of those exceptions could be applicable to electronic searches, and then the Court used the following significant language: “The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case” (389 U.S. at , 19 L. Ed. 2d at 586). The “exception” which the Government wanted was that electronic surveillance of telephone booths should be exempted from “the usual requirement of advance authorization by a magistrate upon a showing of probable cause” (*ibid*). The Court rejected this request of the Government (*ibid*), but what we would here especially note is that, in this part of the *Katz* decision, there appears once again the absolutely taken-for-granted idea, on the part of both the Court and the Government, that the *Katz* electronic activity of the Government’s agents had to pass the muster of the pre-*Katz* Fourth Amendment “basic principles” (*supra*), and that the only escape from this for the

Government in *Katz* would be "the creation of a new exception to cover this case" (*supra*). Could there be any clearer indication that the *Katz* decision was grounded on pre-*Katz* law? For indeed the Government itself implored the Court in *Katz* to lay down a new, prospective "exception" to enable the Government to overcome the pre-*Katz* established law of the Fourth Amendment for the purpose of enabling the Government to win that case.

We therefore submit that this Court might now well wish to reconsider the terms of its order granting certiorari in our case, by now deciding, without need for further elaborate consideration of the retroactivity-prospectivity question herein, that by reason of the "built-in" retroactivity element in the *Katz* decision itself the proper ruling for our case should be now a ruling amending the original order of grant of certiorari to include a reversal of the judgment of the Court of Appeals, and to include also such order of remand as the Court may consider proper, on the authority of the decision in *Katz v. United States*, 389 U.S. 347, without more; that is, without further argument or consideration being required.\*

*Second*, returning now to the pertinent details of *Fuller v. Alaska*, *supra*: The *Fuller* ruling of prospectivity for

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\* We take it that the oral argument presently scheduled for November 12, 1968 will go forward as scheduled. Needless to say, we shall be happy to forego the argument if, after reading this supplemental reply brief, the Court should determine to grant the above suggested amendment of the order allowing certiorari herein. We realize that the practicalities of the Court's scheduling arrangements for its oral argument docket make such an outcome unlikely at this stage. However, we do most respectfully stress our above suggestion that this case can now be summarily disposed of on the basis of the "built in" retroactivity elements in the *Katz* decision as above argued.

*Lee v. Florida, supra*, involves the effect of 47 U.S.C. §605 on State criminal trials. More precisely, however—and more importantly—while *Lee v. Florida* involved the effect of §605 on State telephone *wiretapping*, *Fuller v. Alaska* involves only the effect of §605 on State seizure of *telegrams*. This Court in *Fuller* did not treat this telegram factor as importing any difference, for §605 purposes, as between telegrams and telephone conversations. But we respectfully submit that there is or may very well indeed be an important difference, for the purpose of determining whether *Fuller-Lee* unfavorably affects our retroactivity hopes in the present case. Let us note the text of 47 U.S.C. §605:

§ 605. UNAUTHORIZED PUBLICATION OR USE OF  
COMMUNICATIONS

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving; or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and



no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*. That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

Cardinal to the argument which we are now to advance—in support of our theme of a significant §605 difference between seizure of telegrams and tapping of telephones—is the first clause-sentence of the above quoted statutory language, that is the clause or sentence ending with the words “or on demand of other lawful authority;”. Immediately preceding these concluding words of the sentence or clause in question are the words “or in response to a subpoena issued by a Court of competent jurisdiction”. These last quoted words referring to “subpena” and “demand of other lawful authority” are of prime interest for present purposes—that is, for the purposes of our within effort to distinguish *Fuller-Lee* from *Katz-cum-our* case.

✓ In the first place, the entire opening sentence-clause of §605 to which we refer shows on its face that, at least primarily, the statutory subject matter involved consists of *written* "communication by wire or radio"; this interpretation that the statutory reference is to *written* "communication" is supported, in fact necessitated, by the whole express wording of said opening sentence or clause and by its several specific portions as well. The whole generic situation envisaged by this statutory language is one envisaging *telegrams, cablegrams, radiograms*, i.e., written telegraphic communications. The textual exegesis of this statutory language could be elaborated at great length, but we think no such lengthy elaboration is needed. A few examples from the statutory language will serve the purpose. Thus, the opening words referring to "no person *receiving* \* \* \* or *transmitting* \* \* \* any \* \* \* communication by wire or radio" can hardly refer to telephone calls, but obviously must refer to written telegraph-type items. Similarly, the prohibition against divulging or publishing the "existence, contents" etc. "except through authorized channels of *transmission or reception*, to any person other than the addressee, his agent or attorney" or to persons "employed or authorized to *forward such communication to its destination*", can only sensibly refer to written communications sent "by wire or radio". And like exegesis yields the same results as we comb word by word through this opening sentence or clause of §605.

Now, what is the significance, for present purposes, of this plain reading of the opening sentence or clause of §605 as being addressed to written telegraphic communication? The significance lies in the previously noted concluding

words of that sentence or clause, the words which expressly allow divulgence or publishing of the communication "in response to a subpoena issued by a Court of competent jurisdiction, or on demand of other lawful authority". In other words, the opening sentence or clause of §605, when applied to written telegraphic-type communications (as we contend this statutory provision must apply), expressly allows the divulgence or publishing of a telegram upon proper subpoena or upon other proper demand of lawful authority. *Fuller v. Alaska* involved a telegram. The Court's *per curiam* decision in *Fuller v. Alaska* is silent as to any of the circumstances which led to the obtaining or divulgence of that telegram in Mr. Fuller's trial in Alaska.

But suppose that the telegram in *Fuller* was obtained and divulged pursuant to lawful subpoena or "demand of other lawful authority"? Suppose that the record itself in *Fuller* shows, or colorably supports, the conclusion that there did exist such subpoena or other lawful demand in that case? Suppose, in other words, that, notwithstanding the silence of this Court's *per curiam* decision in *Fuller* on these quite possibly dispositive questions of fact and statutory impingement (§605), the facts disclosed by the certiorari record in *Fuller* as filed in this Court were to reveal affirmative answers to all of our above supposititious questions? Would it not then follow that this Court's whole action in having accepted the *Fuller* certiorari presentation as ostensibly affording a proper occasion for deciding the extremely important question of the retroactivity-prospectivity of *Lee v. Florida* was jurisdictionally and procedurally *improvident*; and that, accordingly, *Fuller v. Alaska* would have to be re-examined by this Court with intensest close-

ness to determine whether that case can stand on this Court's books as a decisional precedent for this vital area of the law?

We think we are in a position to state that the answers apparently indeed are affirmative to our above supposition-formulated questions. In the short time between the rendering of this Court's decision in *Fuller v. Alaska* and the completion of this supplemental reply Brief, we have made diligent effort to find out what the *Fuller certiorari* record as filed in this Court shows concerning these questions. We have not been able to work out the physical arrangements for personal inspection by us of the *Fuller* record. But we have conducted lengthy long-distance telephone conferences with certiorari counsel for petitioner Fuller, who was kind enough to review his copy of the record at our request with an eye towards advising us of the contents of the record on the points here in question.

Through those telephone conferences we are informed that the prosecution in the *Fuller* trial represented to the trial Court that they relied on having had a subpoena or subpoenas for the obtaining of the telegram from the Fairbanks, Alaska office of the Alaska Communications System which was the telegram receiving station; that this subpoena was, apparently in the first instance, a grand jury subpoena; that there might also have been trial Court subpoena process after the grand jury subpoena; and that in any event, alternatively, the prosecution represented that it relied on voluntary disclosure by officials of the Alaska Communications System (a Government agency) who in turn were or may have been acting under a Federal administrative regulation pertaining to such disclosures.



In our aforementioned telephone conferences with certiorari counsel for petitioner Fuller we were cautioned that the *Fuller* certiorari record is in some respects unclear as to just how the telegram was obtained by the Alaska prosecutive officials; as petitioner Fuller's counsel cautioningly phrased it in speaking to us, the record is "muddy". But there is apparently no doubt that some kind of subpoena process was utilized, or was represented by the Alaska prosecutor as having been utilized.

A further caveat, kindly conveyed to us by petitioner Fuller's certiorari counsel, is that the record is apparently silent as to use of any subpoena process in obtaining the copy of the telegram from the originating office of Western Union at Spokane, Washington; the only express record reference to a subpoena is to the Fairbanks Alaska receiving station, involving the aforementioned Alaska Communications System. See *Fuller v. State*, 437 P. 2d 772, 773-774 (S. Ct. Alaska 1968).

Petitioner Fuller's certiorari counsel has also advised us that the certiorari record indicates that apparently no distinct issue was litigated, in the trial Court, with reference to the apparent non-subpoena status of the Spokane copy of the telegram as distinct from the apparent subpoena-status of the Fairbanks copy of the telegram; but that, however, the Spokane copy was brought before the trial Court through the manager of the Spokane Western Union office; the Fairbanks, Alaska copy having apparently been brought into the case through the testimony of a Lieutenant Colonel Swett of the Alaska Communications System.

It appears also that much if not all of the record "muddiness" concerning this subject occurred because the parties



were largely preoccupied, at that stage of the *Fuller* case, with questions as to the admissibility of the telegram on grounds of materiality, identifiable connection with the defendant, questions of search and seizure, and questions of compliance with Federal administrative regulations of the Alaska Communications System—in other words, not primarily on grounds deriving from 47 U.S.C. §605.

According to our information received from Fuller's certiorari counsel as aforesaid, the "muddy" facts above summarized emanate from the Fuller certiorari record at pages 232-240 (and possibly et seq.) and 636-647 (and possibly et seq.).\*

All of our above discussion of the opening sentence or clause of §605, and of the indicated use of the subpoena process in the *Fuller* case, has proceeded on the theory that the law of §605 as to exclusion of written *telegram* evidence is not and cannot be the same as the law of §605 as to exclusion of *telephone wiretap* evidence. Also, obviously the express subpoena provision of the opening sentence or clause of §605 can only refer, in turn, to such *written* communications. It does not refer, and in the nature of things it cannot refer, to telephone wiretap evidence. We do not know how one would go about "subpenaing" telephone conversations.

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\* Counsel herein, being severely pressed for time in completing this supplemental rely brief and in preparing for the oral argument to be held November 12—and being a "one man" practitioner handling this case alone without access to assistance from co-counsel, all of whom advise that their participation in this certiorari proceeding is without fee—regrets the inexactness of the above description of the *Fuller* record. Counsel expects to be able to examine that record in person in Washington before the oral argument herein on November 12.

How, then, can *Fuller v. Alaska* serve as a decisional vehicle for deciding the question of the retroactivity or the prospectivity of *Lee v. Florida*? How can a case (*Fuller*) where, indicatedly, the seized telegram was *lawfully* seized by subpoena or "demand of other lawful authority" pursuant to express lawful authority given by §605,\* be used by this Court for the drastic purpose of resolving the important retroactivity issue of §605-barred *unlawful* telephone wiretap evidence or other §605-barred evidence in State criminal trials (*Lee v. Florida*)? At the least, how can the *telegram* facts of *Fuller* supply this important decisional occasion without at least an express consideration by this Court of the indicated record facts of *Fuller* concerning the subpoena factor which might well make *Fuller* decideable on a ground which would make it unnecessary ever to reach the *Lee*-retroactivity §605 issue?

We hasten to add that we are not for one moment suggesting that, in a case properly presenting the issue of a *telegram* interception, divulgence or publishing, without benefit of the statutory justification of subpoena or "demand of other lawful authority", the exclusionary\* evidentiary protections of §605 ought to be any less available than in a *telephone wiretap* case. On the contrary, aside from the peculiar provisions of the opening sentence or clause of §605 (which, however, in turn reflect the peculiar conditions surrounding a written communication as distinct from words spoken on a telephone), it is undoubtedly true that all of the remaining provisions of §605 which forbid interception, divulgence or publishing of communications are equally applicable to telegrams and to telephone conversa-

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\* We pass here the threshold question of the constitutionality of the §605 subpoena procedure.

tions. Such is undoubtedly true, we think, even though there seems to be a surprising paucity of authority on the telegram aspect under §605. See 53 A.L.R. 1485, 66 A.L.R. 397, 134 A.L.R. 614, and "Blue Book" supplements.

Even more scarce seem to be the authorities on the subpoena provision of the first sentence or clause of §605 (relating to telegrams). But on this latter point the statutory language seems so clear, that we believe we are correct in our above argument—to the effect that if, as indicated, *Fuller v. Alaska* involved a subpoena, the issue of violation of §605 is not necessarily reached in that case, and consequently that case cannot necessarily soundly be used to enunciate a prospectivity decision with respect to *Lee v. Florida*. Or, at the very least, *Fuller* cannot soundly be so used without first considering in the most thoroughgoing way the whole statutory-interpretation problem of the subpoena provision of §605, and without first also threshing out thoroughly the apparently unclear record facts of *Fuller* relating to the subpoena item.

Further supporting our above suggested distinction between the telegram provisions and the telephone wiretap provisions of §605, may be mentioned considerations of the sort which were prominently discussed in the *Katz* and *Lee* decisions, namely, the varying or relative values or degrees of Fourth Amendment protection given to different kinds of privately-intended communications of individual declarants. The familiar distinction in this regard, as noted in *Katz* and *Lee*, is that between the privacy of the home and the non-privacy (or the lesser privacy) of the "open field". Similar distinguishing considerations may readily be contemplated with regard to private oral words on one hand and private written telegrams on the other hand.

Under the privacy-intention test which is prominent in the *Katz* decision especially, it would surely seem that all possible Fourth Amendment protection should be given to the individual who does *all he possibly can* to keep his words private, as by confiding the words only to a trusted friend in the private seclusion of his own home. On the other hand, the *Katz* privacy-intention test does not suit nearly so effectively for the protection of the man who chooses to impart his supposedly private words to the institutional echelon channels of a telegraph company.

For our own part, we would like to see the telegraph sender protected equally with the private home conversationalist (or the telephone speaker) against any snooping in violation of the Fourth Amendment. But the legal-constitutional reality seems to be that there are gradations of Fourth Amendment protection under which the telegraph-sender may stand less favored than other types of private word-declarants.

To the extent that such gradations do exist in our law at the present time, our above argument that *Fuller v. Alaska* is not a proper vehicle for deciding the prospectivity-retroactivity question under *Lee v. Florida*, gains support from the existence of those gradations in the law.

In referring just now to Fourth Amendment aspects we had no intention of blurring the fact that *Fuller v. Alaska* and *Lee v. Florida* rest not on the Fourth Amendment but on a statute (§605), whereas *Katz* and our case do rest on the Fourth Amendment. We turn next to this latter important distinction.

*Third*, then, as we noted earlier, *Fuller* and *Lee* are purely §605 cases; the Court explicitly declined to reach the Fourth



Amendment issue in *Lee*, and the Court's analogy references in *Fuller* to *Mapp* as being similar to *Lee* in having been "designed to enforce the Federal law" still leave *Lee-Fuller* as resting in §605 rather than on the Fourth Amendment. Since, nevertheless, the Court in *Fuller* did thus analogize *Lee* with *Mapp*, and partly for that reason the Court declined to make *Lee* retroactive, and since *Mapp* did involve Fourth Amendment values and not only the statutory §605 values, we realize that it is probably going to take some arguing to persuade this Court that our own Fourth Amendment values (deriving from the *Katz* Fourth Amendment values) are still worthy of favorable consideration on the retroactivity issue notwithstanding the *Fuller* treatment of *Mapp* in analogy to *Lee*.

Our further argument for this purpose is:— To begin with, we would again invoke our presentation *supra* where we urged that the *Katz* decision itself embodied a "built in" retroactivity conclusion based in the most direct way on the Fourth Amendment essence of judicial control of search warrants.

Further, and really as an outgrowth of the point just mentioned, we would urge that while the pre-*Mapp* law had its *Wolf v. Colorado*, 338 U.S. 25, and while the pre-*Lee* law had its *Schwartz v. Texas*, 344 U.S. 199, the pre-*Katz* law had no such "prior-reliance" millstone case to cut from around its neck. Is not this precisely why *Katz* is so conspicuously worded throughout in terms of a pre-*Katz* body of Fourth Amendment law which the Government's agents in *Katz* were found to have violated?

Fourth, even in the *Mapp* situation, as translated by *Linkletter v. Walker*, 381 U.S. 618, for prospectivity-retroactiv-



ity purposes, cases pending on appeal at the time of the *Mapp* decision were given the benefit of that decision.

*Fifth*, we referred above to the factor of reliance on prior decisions, as distinguishing *Mapp-Linkletter* and *Lee-Fuller* from our case *cum Katz*. *Fuller* speaks also, as seen, of *Mapp* and *Lee* as both being "designed to enforce the Federal Law". These words in *Fuller* suggest that the Court's concern is with prevailing upon the States to abide by the Federal Law. The delicate problems of federalism, upon which we dwelt extensively in our opening brief, and which are again connoted in the above mentioned language in *Fuller*, are not present in our case *cum Katz*. We submit that this is a quite possibly dispositive distinction between our case and *Fuller-Lee*, and not less so when consideration is had of the judicial duty to exercise the supervisory power over the administration of Federal criminal justice; and the more so, furthermore, when consideration is had, once again, that the value which is going to be either vindicated or sacrificed in our case—depending on how the retroactivity-prospectivity question is decided—is that constitutional value which the Court evidently regarded in *Katz* as being so securely enshrined under pre-*Katz* law, namely, the rock-bottom Fourth Amendment value of judicial control of search warrants.

*Sixth*, *Fuller-Lee* differ from our case in another fundamental respect. The Court in *Fuller* said that the purpose of *Lee* was not to enhance the reliability of the fact-finding process, but was, again, rather to enforce the federal law. We think we have shown in our opening brief and in our previous reply brief, that there is most pronouncedly an issue in our case as to reliability of the fact-finding process,

both because of the unsatisfactory condition of the alleged Waldorf Astoria tapes, and because underlying moral (and therefore constitutional) questions troublingly affect our case by reason of the Government's resort to an intrinsically odious method of investigation and the indications of extremely questionable honesty of the investigative personnel in their conduct of, and subsequent testimonial description of, the electronic snooping.

But we also realize that none of these latter considerations can assuredly avail to fend off the ultimate thrust of what appears to be the Court's basic stand in *Fuller*, that evidence seized in violation of statutory or constitutional prohibitions may be "relevant and reliable." Again, therefore, we must fall back upon our suggestion, in our prior briefs herein, and referred to in our immediately preceding paragraph, that, to put it simply, the overall decency of the "fact-finding process", and not only the relevance and reliability of that process, ought to be considered. *A fortiori*, this last is worthy of consideration in the framework, again, of the *Katz* decision's staunch declarations in favor of a pre-*Katz* Fourth Amendment ban against electronic searches carried out behind the backs of the judiciary.

*Seventh*, the final reason stated in *Fuller* for the prospectivity ruling is the undesirability of upsetting a large number of State criminal convictions. "This circumstance does not apply in our case. The Government has acknowledged that there are not a large number of cases that would be affected by a retroactivity ruling for *Katz*, although the Government urges that some of the cases (including this one) are very important. This issue has been much threshed in the prior briefs herein and need not be further argued now.

*Eighth*, in concluding this argument on the *Fuller-Lee* problem, we are obliged to refer once again to what we above termed the "built in" retroactivity ruling of the *Katz* decision itself. As seen, *Lee*, as glossed by *Fuller*, has been reasoned by this Court as having nothing to do with the Fourth Amendment as a decisional ground, as having only to do with §605, and as simply affording no justification whatever for retroactivity because the purpose of *Lee* was merely to enforce compliance with the Federal law. We hope we may be pardoned for expressing our sadness over the fact that the references in *Lee* (quoted from *Nardone v. United States*, 302 U.S. at 382, 383) to telephone wiretapping as denoting unethical standards and governmental conduct destructive of personal liberty, find no echo in *Fuller* and that instead *Fuller* is reductively worded down to a minimal expression favoring the rather colorless aim "to enforce the Federal Law". We intend no disrespect, but it almost seems as though the tone of ethical affirmation which the Court struck in *Lee* (as in *Katz*) has now somehow generated an opposite pendulum swing towards ethical tonelessness in *Fuller*. Our interest in speaking thus is not merely one of some sort of judicial-literary criticism. Our interest is not even one of immediate partisan advocacy at this moment. Our concern is that if, *via* a decision in our case, *Katz* should be held not retroactive, *Katz* itself may perish in even its "prospective" chance of viability. No one needs to labor the unhappy truth that this country is today passing through an era of slippage of its energies of ethical character. *Katz* was a very great ethical declaration. The ethical power of *Katz* resides *par excellence* not in judicial oratory or preaching, for *Katz* neither orates nor preaches. The power of *Katz* lies in its absolutely admirable jurisprudential qualities, in its combination of un-

assailable legal history, all-around impeccable scholarship, creative judicial technique and implicit judicial fearlessness to declare constitutional policy. If we are correct in our reading of *Katz*, as we developed the reading at some length earlier in this brief, *Katz* says that, long before *Katz*, it was constitutionally wrong for the Government to engage in non-trespassory electronic eavesdropping without complying with the Fourth Amendment. That saying in *Katz* is the real courage, and the real constitutional and social good, of the decision. The courage and the good of a decision like *Katz* are not in the judicial saying that, 'from now on, or starting now, we are all going to be more courageous and more good'. The courage and the good lie in the stalwart judicial saying that 'we have been wrong, all of us (or most or many of us), for at least some time now in our unconstitutional behavior, behavior which the Constitution has forbidden to us for at least some time now, and we are now not only going to try to act better for the future but we are going to give up the fruits of our past bad conduct'. Since *Katz* depends totally, throughout its entire essential reasoning, on the positing of *past* (pre-*Katz*) Fourth Amendment requirements, what chance does *Katz* have of governingly affecting the constitutional behavior of law enforcement officials if the Court should now (in this case of ours or in some other case soon to come) repudiate its own declared *raison d'être* of constitutional courage and constitutional honor for the *Katz* decision, by announcing to the country that the retrospectively recognized points of constitutional principle that gave birth to *Katz* do not have enough constitutional life in them to support a ruling of retroactivity for *Katz* in regard to other cases, few though those cases are (by the Government's own admission),



and not even for the minimal number of those cases which were still pending on direct appeal when *Katz* was decided?

## **II. Supplementing our previous reply brief treatment *re* the issues as to legality of the Waldorf-Astoria eavesdropping under pre-*Katz* standards.**

The grant of certiorari in this case was not limited. Our questions included, in addition to the *Katz*-retroactivity question and other questions which we shall not further refer to herein, three "questions presented" which raised issues as to the pre-*Katz* constitutionality of the Waldorf-Astoria room bug (see Questions 3, 4 and 5 as formulated in our opening brief, pp. 4-7).

Thus, our position in this case on the electronic eavesdrop issues does not depend entirely on the *Katz*-retroactivity outcome. This case involves unconstitutional electronic eavesdropping, or at least it involves an unsatisfactory governmental negation of unconstitutional electronic eavesdropping, under pre-*Katz* standards.

In our previous reply brief we left unanswered one topic in the Government's brief which requires reply. We refer to the Government's treatment at pp. 56-57 of its brief, where the Government discusses the question of why the microphone allegedly located in the agents' own room did not apparently pick up intrusive sounds originating in the agents' own room. This portion of the Government's brief is short; and we shall quote it because we wish to reply to it in detail, sentence by sentence (G. Br. 56-57):

" \* \* \* The microphone, which was placed next to the floor on the agents' side of the first door, was shielded



from sounds originating in the agents' room both by a mask of adhesive tape and by a folded bath towel (R. 3211-3213; Gov. Exhs. 3, 4). Moreover, instead of being set for automatic operation by means of the sound-actuated switch, the recorder was operated manually by agent Kiere whenever he wanted to make a recording (R. 374, 558-661, 669-670, 3215-3216, 3225-3226), and the door to the bathroom was kept closed on those occasions (R. 373, 668-668a, 3215-3216). Finally, the short-wave radio, typewriter, tape playback mechanism, and generally the telephone, were used before and after, but not during the recordings of conversations (R. 700, 702-704, 857-858, 930-932). In the few instances where the telephone was used during a recording the tape contained noises evincing such use (see, e.g., R. 594-595, 620, 660)."

In the above quotation from the Government's brief the first sentence, to the effect that the microphone "was shielded from sounds originating in the agents' room both by a mask of adhesive tape and by a folded bath towel" is not supported by the Government's record references. The Government cites R. 3211-3213, and Exhibits 3 and 4. The exhibits are merely photographs, proving nothing. The cited record pages 3211-3213, far from depicting any purpose to "shield" "sounds originating in the agents' room", consist merely of testimony by agent Durham that he put adhesive tape on the microphone in order to enhance its capacity as "a collector of sound, directing the sound into the microphone itself" (R. 3211-3212); and the only measure Durham said he took to prevent unwanted sounds from entering into the microphone was the draping of the bathroom towel around the microphone, because he was concerned about this problem "after discovering that by any

one moving around in this room they would cause sound to enter from this room into the microphone"; agent Durham did not even say that the towel invariably remained in position, but only that "usually" it remained in position (R. 3212-3213). It does not require very much of a knowledge of "electronics" to know that a "bathroom towel" is scarcely going to do much good as a hermetically or acoustically sealing device for closing off sounds from an allegedly highly sensitive eavesdrop microphone. Durham's story of the towel as having created the effective muffling device is simply ridiculous on its face. We respectfully invite the Justices of this Court to drape a bathroom towel over their own telephones and experience whether there is any appreciable muffling of sound at all; and a conventional telephone instrument is much less fidelity-powered-sensitive than the sort of microphone allegedly used at the Waldorf-Astoria in this case. The Government is wrong, therefore, in saying in its brief (p. 56) that the microphone was "shielded". There was no "shielding" "mask of adhesive tape" at all; there was only a taping of the microphone for allegedly sharpening up the bugging function of the microphone, not at all to "shield" or "mask" it against unwanted sound. Also, the Government's story of the bath towel is exaggerated in the statement, wholly unsupported in the record, that the towel was "folded". Agent Durham did not say that the towel was folded, he said only that the towel "covered the microphone" and was pushed up along or under the apperture at the bottom of the door leading to Nebbia's room.

The Government's next statement in its portion of the brief (pp. 56-57) above quoted is that Kiere at all times exercised manual control over the tape recorder, i.e., that the recorder did not automatically actuate on to sound re-

ception. The Government's Record references for this statement will now be noted. R. 374 is merely a vague, *en passant* question and answer at the trial (not at the Waldorf pre-trial suppression hearing), in which agent Kiere was interrogated on direct examination (by the Government attorney as follows:

"A. I see. Are you familiar at all with the mechanical aspects of the equipment that you were using?

A. No, sir. Just whatever was explained to me by Agent Durham as to how to operate the tape recorder.

Q. So what you did in effect was turn it on and turn it off as the occasion demanded? A. That's right!"

The government's next Record reference is R. 658-661. These four pages of Agent Kiere's testimony establish only that sounds, such as telephone calls made in the agents' room, were in fact picked up on the microphone tape, and that because there were defects in the automatic sound pick up "most of the time" Kiere operated the sound receiver manually.

This is a far cry from the Government's theory that the automatic sound pick up was *deliberately* not used; on the contrary the picture is one of general, all around mechanical unpredictability and ineptitude, in which Agent Kiere had no really effective control over the automatic sound actuation or the manual substitution therefor.

The Government's next record reference on this subject is R. 669-670, which in fact apparently establishes that on one occasion when Kiere turned off the tape recording machine the microphone and amplifier were still activated, there

being no negating by Kiere in connection with this incident that the defectively functioning automatically actuated voice recorder was working even though manually the machine was turned off.

The Government's next record reference is R. 3215-3216, which indicates only in a vague way that Kiere had problems with the mechanism.

The Government's next record reference is R. 3225-3226, where Kiere testified that because he had a cold and his coughing actuated the recorder, he operated the machine manually "whenever I was here", "practically every occasion".

The Government's next record reference, to the effect that the door to the bathroom in the Agents' room was ordinarily kept closed, we do not challenge (R. 373, 668-668a, 3215-3216).

The Government's next record reference relating to unwanted sounds of short wave radio, typewriter, tape play back, telephone, etc., will now be noted. R. 700 refers merely to a general statement by Kiere that he did not engage in typing when he heard something coming over on the microphone; obviously this does not take care of the problem of why the microphone did not pick up typing sounds during times when Kiere did not hear something coming over the microphone.

At R. 702-704 appears testimony by Kiere whose relevance to the Government's contention we cannot see at all.

The Government next cites R. 857-858, where Kiere testified that he did certain typing on one occasion which was



not during any eavesdrop conversation. We acknowledge that this item is probative *pro tanto*, but that is far from meeting the general problem of the several-days electronic surveillance period.

The Government's next record reference, R. 930-932, is really quite irrelevant to the topic for which the Government cites it, for at this place in the record the Government was trying to prove substantiation of its identification of Nebbia as having been the person in the Hotel room who was being electronically audited; in other words at this place in the testimony the Government was interested in showing that the telephones and radio of the Agents did get through to the Agents in their room because this was going to help the Government prove that through the coordination of the various Agents they were keeping tabs on Nebbia so as to identify him as engaging in bugged conversations. It is absolutely irrelevant for the Government to cite these pages of the record (930-932) for the point here in question.

The Government's next record reference is R. 594-595, which involves nothing more than an acknowledgement by Agent Kiere of one instance of telephone sound received on the tape record which was allegedly in the agents' room. A similar item, involving a telephone dialing sound, appears at the Government's R. 620 reference. To the same effect is the Government's reference to R. 660.

We have no wish to over-argue any point as between the Government and ourselves in regard to questions of who has accurately cited the record. But we cannot refrain—in concluding this presentation—from noting the really improper exaggerations and over-generalizations in several of the above record-analyzed statements in the Govern-



ment's brief at pp. 56-57. One such exaggeration is the Government's statement that "the recorder was operated manually by Agent Kiere *whenever* he wanted to make a recording"; as above noted, the record leaves this exaggeration of the Government hanging rather unattractively in mid-air; "*whenever*" means *always*; that is not the testimony. Similarly the Government exaggerated in its flat statement that "Finally, the short wave radio, typewriter", etc., "were used before and after, but not during the recording of conversations", and that "in the few instances where the telephone was used during a recording the tape contained noises evincing such use". These exaggerations of the Government are simply that, exaggerations.

The question of the ultimate truth of whether the microphone, in the form claimedly used by the Government, suspiciously failed to pick up more sounds in the Agents' room, is quite possibly dispositive of the issue of the honesty of the Narcotics Bureau testimony concerning this electronic bugging at the Waldorf-Astoria.

## CONCLUSION

It is respectfully submitted that the relief prayed in the conclusion to our opening brief should be granted.

Respectfully submitted,

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November 1968



MAY 12 1969

IN THE  
**Supreme Court of the United States**

OCTOBER TERM—1968

DAVIS, CLERK

No. 12

SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE  
LEFRANC, JEAN NEBBIA and ANTHONY SUTERA,

*Petitioners,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ of Certiorari to the United States  
Court of Appeals for the Second Circuit**

**PETITION FOR REHEARING**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1968

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**No. 12**

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SAMUEL DESIST, FRANK DIOGUARDI, JEAN CLAUDE LEFRANC,  
JEAN NEBBIA and ANTHONY SUTERA,

*Petitioners,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE SECOND CIRCUIT

---

**PETITION FOR RE-HEARING**

The above named petitioners jointly pray for re-hearing  
of the judgment of March 24, 1969\*.

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\* By order of Mr. Justice Stewart our time for filing this petition for rehearing has been extended to May 12, 1969.

The Court has affirmed petitioners' convictions on the basis that *Katz v. United States*, 389 U. S. 347, is inapplicable to this case—"Katz is to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967. Since the eavesdropping in this case occurred before that date and was consistent with pre-Katz decisions of this Court, the convictions must be Affirmed" (No. 12, slip op. (per Mr. Justice Stewart), pp. 10-11).

To arrive at the above holding in this case the Court had to resolve against petitioners each of several exceedingly debatable points, including the following points of which we wish to speak further in this petition for re-hearing.

# I.

Doubtless the single most conspicuous of the notably debatable points on which the decision of March 24 in this case rests, is the point signalized in Mr. Justice Harlan's statement that "'Retroactivity' must be rethought" (no. 12, slip op., dissenting opinion of Mr. Justice Harlan, p. 2).

Surely we are not going to impose on the Court by re-hashing in this petition for re-hearing the numerous arguments in our previous lengthy briefs on the whole constitutional philosophy of "retroactivity". But, since the treatment of this subject in our previous briefs was so exceptionally full, and since it seems not unlikely that Mr. Justice Harlan's call for a re-thinking of "retroactivity" will evoke response from other Justices one of these days when "the right case" comes along, we now ask the Court to consider that there are excellent reasons for the Court to use this present case of ours as the vehicle for such a re-thinking of retroactivity. The reasons are ones

of fairness to the present petitioners, and convenience of the Court. These petitioners (their counsel, that is) did perform the task of laying before the Court a detailed analysis of the basic problems of the constitutional policy choice between retroactivity and prospectivity; we do not think this subject was briefed on a comparable scale, in prior cases, and we venture to expect that briefs in future cases will not evolve the constitutional analysis significantly further than we have already done it in our briefs. Thus, it seems fair that we should be included in any re-thinking of retroactivity, if only because our efforts to contribute to such a re-thinking give us an "equity";\* and such would be consistent also with the Court's own convenience, as the Court has already familiarized itself with this case through the exhaustive review labors which the Court customarily undertakes in deciding a case on the merits.

Another factor favoring that this case be included in any re-thinking of retroactivity, is that the Government has really not yet been heard from in this case on that larger topic of a re-thinking of retroactivity. That is, in its written and oral presentations in this case the Government evidently chose to argue retroactivity along *stare decisis* lines, rather than arguing the constitutional-doctrinal merits of an overall re-thinking of retroactivity. With the benefit of the background of the work already done in this case by the parties and the Court, a rehearing in which the Government would brief the larger

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\* As we noted in our main brief on the merits herein, p. 73, the Court recognized in *Stovall v. Denno*, 388 U. S. 293, 301, that one important factor in deciding how to handle retroactivity problems is "the possible effect upon the incentive of counsel to advance contentions requiring a change in the law" (citing scholarly commentators).



questions would render this case ideally suited for the rethinking endeavor with a minimum of further effort for all concerned.

Still another factor favoring our above suggestions is that at the next Term the Court will be hearing argument on the merits in *United States v. White*, no. 124. It appears that *White* must inevitably entail litigating the contemporaneous meaning of what the Court did in *Osborn v. United States*, 385 U. S. 323, decided December 12, 1966. That is, both *Osborn* and *White* involve the question of one-party—consensual “uninvited ear” electronic over-hearing, and it therefore does seem inevitable that the Court’s forthcoming full consideration of *White* must entail a likewise full exploration of the contemporaneous meaning of *Osborn* in relation to the Fourth Amendment. *White* seems bound to evoke an expression by the Court on the question of whether *Osborn* is to be read as contemporaneously having brought all electronic search of private conversation under the judicial-warrant requirements of the Fourth Amendment. In other words, *White* seems bound to decide whether *Osborn* settled this latter Fourth Amendment question a year before *Katz* did. And if *White* takes that decisional course or turns out to involve that question, would it not be only fair to allow us to participate companion-wise, so to say, in the *White* situation at the next term? Such a companion participation by us would be appropriate (and we believe valuable) through the medium of granting us a re-hearing to be considered together with the hearing of *White* on the merits.

In deciding our case on March 24 the Court did not say anything about our fundamental constitutional contention that a decision departing from prior decisions on a matter of constitutional right, stands necessarily as a declara-

tion that the prior decisions wrongly interpreted the Constitution, so that making the new decision purely prospective amounts to *denying prospectivity to the Constitution itself*. The Court did not mention this argument of ours in its opinion (nor did the Government in its briefs or oral argument). A Constitution, being the supreme form of "legislation" in a society governed by Popular Sovereignty and Constitutional Limitations, and the very essence of the operativeness of "legislation" being that its operation is *prospective*, this issue of denying prospectivity to the Constitution itself is one which the Court cannot permanently leave unconsidered and undecided. Indeed this great issue is at the heart of a re-thinking of retroactivity. And for all of the above stated reasons—as well as for our further reasons *infra*—we ought to be included in any such re-thinking.

## II.

At the risk of sounding too subjective, or overly-familiar in our mode of addressing the Court, may we say that the single most painful feature for us in the Court's decision of March 24 was the denial to us of the benefit of the rule of *Linkletter v. Walker*, 381 U. S. 618, making a new overruling Fourth Amendment decision applicable to all cases then subject to direct review. The chronological circumstances in our particular case that should have commended us for retroactivity-benefit under *Katz* are exceptionally compelling. See our description of the chronological relationship between the sequences of our case and the sequences of *Katz*, in our main brief herein at pp. 52-57, 107-111. We especially now wish to emphasize one of the chronological factors that we deem peculiarly compelling, and which the Court did not mention in its decision of March 24. We refer to the Government's lengthy delay in having made disclosure of the

additional "Schipan review" electronic eavesdrop items in Georgia and Florida (*ibid.*). This delay by the Government delayed the progress of our appellate course in this case by at least six months, totally without any fault on our part (*ibid.*). Had the Government not thus unjustifiable delayed us and the reviewing Courts, our case, at the least, would have been argued and decided simultaneously with *Katz*; and indeed it is a good probability that our case would have been "the *Katz* case", and that *Katz* would have been "the *Desist* case" (in which retroactivity is not granted). We just mentioned that this Court did not refer to this anguishing chronological misfortune of ours, in the opinion of March 24; it also seems proper to mention that the Government did not treat this topic at all in its briefs or oral argument in this case. Hard as it seems to justify on sound doctrinal grounds, much less in point of simple fairness, the denial of retroactivity in a "*Desist* case" despite the extremely close chronological connection with the *Katz* sequence, it seems even harder to justify this in view of the above mentioned specific additional chronological factor of the Government's having so inexcusably delayed the progress of our appeals.

### III.

The *Katz* decision (December 18, 1967) did not announce any rule of retroactivity or prospectivity; that was to come later, in our case. However, at the time *Katz* was decided the closest thing there was to an indicative guideline for *Fourth Amendment* retroactivity versus prospectivity, was the *Linkletter* principle allowing the benefit of retroactivity to all cases still subject to direct review and, *a fortiori*, to cases then actually pending in this Court on review on the merits. But then came the

March 24, 1969 decision in our case, applying the "all out" or pure prospectivity rule of *Stovall*.

Now, it seems to us that when one speaks of retroactivity in this present setting one is really speaking of *two* retroactivity aspects. *First*, there is the aspect of whether in principle *Katz* should be given any retroactivity at all, and *second* there is the question of exactly how to implement procedurally a non-retroactivity principle for *Katz*. Given the judicial attitude that retroactivity *versus* prospectivity needs to be decided *ad hoc* for each new overruling decision—rather than the attitude that each such new decision ought to apply the Constitution itself prospectively—it necessarily follows that some persons are not going to be having the benefit of retroactivity as the case-by-case process unfolds. That is, the very idea that in principle retroactivity may or may not be granted with respect to a particular new decision, negates the opposing doctrine of the prospectivity of the Constitution itself, negates the opposing doctrine that every one ought to get full retroactivity from every new decision; and we well realize this obvious fact of life in this branch of the law under the Court's contemporary view of retroactivity.

But there is also that second aspect above mentioned, in regard to the problem of exactly how, procedurally, this retroactivity philosophy of the Court should be administered in each particular situation generated by a new overruling decision. Specifically, what we mean concerning this apparently abstruse second aspect of the retroactivity problem is, that while it was evidently "in the cards" for *Katz* to be held non-retroactive in principle, why was it inevitable also that this non-retroactivity principle for *Katz* should be accompanied also by the "all out" *Stovall* rule of *absolute* prospectivity, for everyone except Mr. *Katz* himself? And it is on this second aspect that

we respectfully perceive a deeper level of the "retroactivity" problem as such, and as applied to our case:

As above mentioned, at the time *Katz* was decided the indicatively applicable procedure-choice for administering any non-retroactivity of *Katz* was the *Linkletter* Fourth Amendment procedure-choice by which non-retroactivity still left unhurt (that is, benefited) those parties whose cases were then subject to or pending on direct review. This indicatively applicable *Linkletter* Fourth Amendment procedure remained viable down until the moment our Fourth Amendment case was decided on March 24, when we were "given" *Stovall* (not a Fourth Amendment case) instead of *Linkletter*. Now, if non-retroactivity, or if "all out" prospectivity, is to be sauce for the goose, why should it not also be sauce for the gander? Why should not the tacking-on of *Stovall* onto the *Katz* non-retroactivity principle of *Desist*, operate purely prospectively for all persons except Mr. *Desist* and his fellow petitioners herein? For, again, the pre-existing indicatively applicable procedural principle for administering non-retroactivity in the Fourth Amendment area was *Linkletter*, not *Stovall*; the first time *Stovall* was declared applicable to the Fourth Amendment area was in our case on March 24, 1969. In this era in which the Court is favoring so strongly a doctrine of prospectivity purism in administering non-retroactivity, does not consistency (not to say simple fairness) require that this procedural purism live up to its declared doctrinal aspirations with a true and unvarying purism? If the *Stovall* procedure for administering Fourth Amendment non-retroactivity of *Katz* is what the Court deems wise, and if that *Stovall* choice necessarily imports (as we contend) an over-ruling of the indicatively pre-existing rule (*Linkletter*), how can it be justified to make this over-ruling of *Linkletter*



*retroactive?* Under present doctrine all over-rulings where retroactivity in principle is not allowed are supposed to operate according to the purest concept of prospectivity, except for the successful party in the over-ruling case. Why, then, should not the indicated over-ruling of the *Linkletter* procedure in our case, in favor of the *Stovall* procedure, likewise be made prospective *except for the successful parties (our within petitioners) in the over-ruling decision (the decision herein of March 24, 1969)?* We submit that this perhaps intricate, but we think inescapable, analytical feature of the "retroactivity" thinking that has gone into the decision of our case, may have escaped the Court's attention, and should now be considered in a re-hearing of our case—irrespective of whether there is going to be that larger re-thinking of retroactivity which we mentioned earlier and which Mr. Justice Harlan has invited in his words. "‘Retroactivity’ must be rethought".

#### IV.

At p. 8 of the slip opinion herein, *per* Mr. Justice Stewart, it is stated:

"\* \* \* Moreover, the determination of whether a particular instance of eavesdropping led to the introduction of tainted evidence at trial would in most cases be a difficult and time-consuming task, which, particularly when attempted long after the event, would impose a weigly burden on any Court. \* \* \*"

The above quoted statement of the Court is not applicable to our case. For, as we noted at p. 70 of our main brief on the merits herein, "if *Katz* applies to us, the record in our case is such that no remand would be needed for further exploration of the constitutional facts, and the Government has in effect so conceded in this case \* \* \*"

## V.

In the last paragraph of footnote 2 of Mr. Justice Stewart's opinion for the Court herein, slip op., p. 2, the Court rejects our contention that in the Waldorf Astoria bugging the air space between the doors acted as a sound chamber and that the installation was therefore equivalent to a physical penetration of petitioner Nebbia's hotel room. The Court states that it is unable to distinguish this eavesdropping from that condoned in *Goldman v. United States*, 316 U. S. 129, "where the agents simply placed a sensitive receiver against the partition wall". However, the science of electronic eavesdropping in *April 1937* when the Goldman eavesdropping was done (*United States v. Goldman*, 118 F. 2d 310, 313 (C. C. A. 2, 1941)), or indeed in *April 1942* when this Court decided the *Goldman* case, was a far different and lesser science from what it had become by the time of the sophisticated electronic procedures employed in our case (*December 1965*). We respectfully ask the Court to ponder whether its rejection of our detailed showing of the "parabolic mike" nature of the Waldorf installation in our case can rightly and fairly be disposed of solely on the anachronistic "authority" of *Goldman* (see our main brief on the merits herein, Point II).

## VI.

Petitioners respectfully make special request addressed to Mr. Justice Black: Mr. Justice Black concurred in the affirmance of the judgment of conviction in this case "for the reasons stated in his dissenting opinion in *Katz v. United States*, 389 U. S. 347, 364 (1967)", also stating that he did this "while adhering to his dissent in *Linkletter v. Walker*, 381 U. S. 618, 640 (1965)" (slip op., at conclusion of opinion for the Court *per* Mr. Justice

Stewart, p. 11). Particularly in view of Mr. Justice Harlan's signalling call, as we above ventured to characterize it, that "'Retroactivity' must be rethought", we respectfully urge Mr. Justice Black to reconsider his conclusion in this case by giving renewed adherence to his *Linkletter* position *via* a vote for re-hearing in our case. If the re-thinking of retroactivity invited by Mr. Justice Harlan should come to pass, Mr. Justice Black's dissenting position in *Linkletter* would receive *de novo* consideration by the entire Court. That such *de novo* consideration is by no means an unrealistic prospect, is denoted by the very fact that Mr. Justice Harlan himself has now announced his own reconsideration of his *former* position in which he sided with the *Linkletter* majority (and with the majority in the post-*Linkletter* cases) on the retroactivity issue. We respectfully urge Mr. Justice Black to take into account that, even though he does not approve of the *Katz* principle as such, each individual Justice may, when he deems it proper, accept as decisionally binding upon himself (for purposes of concurrence rather than dissent in future cases) the *substantive* rulings of the Court with which he may have disagreed, and that each individual Justice, so accepting such a *substantive* ruling of the Court, may also properly continue to adhere to his own individual position on a *procedural* or otherwise collateral aspect touching the substantive principle with which he has disagreed. We are suggesting, in other words, that, particularly in view of the vigorous expressions of dissent in this case by Mr. Justice Harlan as well as by Mr. Justice Douglas and Mr. Justice Fortas, and in view of all of our foregoing arguments in this petition for re-hearing, Mr. Justice Black ought to consider voting for re-hearing herein on the basis of his *Linkletter* position and notwithstanding his *Katz* position.

## CONCLUSION

It is respectfully prayed that this petition for re-hearing should be granted; that if the Court deems proper such rehearing should be scheduled for consideration together with the proceedings on the merits at the next Term in *United States v. White*, no. 124; and that if re-hearing is granted the petitioners may address themselves anew to all of the issues in this case without limitation or restriction, rather than being confined to the points presented in this petition for re-hearing.

Respectfully submitted,

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**Certificate of Counsel**

I certify that the foregoing petition for re-hearing is presented in good faith and not for delay, all petitioners being incarcerated serving their sentences, and no applications for bail being pending or contemplated in the present posture of the case.

ABRAHAM GLASSER,  
*Of Counsel for all Petitioners.*

Dated: May 11, 1969.



# SUPREME COURT OF THE UNITED STATES

No. 12.—OCTOBER TERM, 1968.

Samuel Desist et al., Petitioners, v. United States.	}	On Writ of Certiorari to the United States Court of Ap- peals for the Second Circuit.
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[March 24, 1969.]

MR. JUSTICE STEWART delivered the opinion of the Court,

The petitioners were convicted by a jury in the District Court for the Southern District of New York of conspiring to import and conceal heroin in violation of the federal narcotics laws.<sup>1</sup> An important part of the Government's evidence consisted of tape recordings of conversations among several of the petitioners in a New York City hotel room. The tapes were made by federal officers in the adjoining room by means of an electronic recording device which did not physically intrude into the petitioners' room.<sup>2</sup> Because there was no "trespass"

<sup>1</sup> 26 U. S. C. § 173 (1964) provides in pertinent part that "It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction. . . ."

26 U. S. C. § 174 (1964) provides in pertinent part:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000."

<sup>2</sup> The room occupied by the petitioners was separated from that of the agents by two doors with a small air space between them. According to the testimony of the federal agents—which was prop-

or "actual intrusion into a constitutionally protected area," the District Court and the Court of Appeals rejected the petitioners' argument that this evidence was inadmissible because the eavesdropping had violated their rights under the Fourth Amendment. The convictions were affirmed,<sup>3</sup> and we granted certiorari to consider the constitutional questions thus presented.<sup>4</sup>

Last Term in *Katz v. United States*, 389 U. S. 347, we held that the reach of the Fourth Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.*, at 353. Noting that the "Fourth Amendment protects people, not places," *id.*, at 351, we overruled cases holding that a search and seizure of speech requires some trespass or actual penetration of a particular enclosure. We concluded that since every

erly credited by both courts below after an exhaustive hearing that included an actual reconstruction of the equipment in the hotel room—the microphone was taped to the door on their side. The face of the microphone was turned toward the  $\frac{3}{8}$ -inch space between the door and the sill, and a towel was placed over the microphone and along the bottom of the door in order to minimize interference from sounds in the agents' room. A cable was run from the microphone to an amplifier and tape recorder in the bathroom adjoining the agents' room.

Petitioners contend that this installation was equivalent to a physical penetration of the petitioners' room because the airspace between the doors acted as a sound chamber, thereby facilitating the pickup of the conversations next door. We are unable, however, to distinguish this eavesdropping from that condoned in *Goldman v. United States*, 316 U. S. 129, where the agents simply placed a sensitive receiver against the partition wall. Petitioners' reliance on *Silverman v. United States*, 365 U. S. 505, is misplaced. The heating duct system used as a sound conductor by the agents in that case was "an integral part of the premises occupied by the petitioners," 365 U. S., at 511, and the agents had to penetrate the petitioners' house with a "spike microphone" before the heating duct could be thus employed.

<sup>3</sup> 384 F. 2d 889.

<sup>4</sup> 390 U. S. 943.

electronic eavesdropping upon private conversations is a search or seizure, it can comply with constitutional standards only when authorized by a neutral magistrate upon a showing of probable cause and under precise limitations and appropriate safeguards. The eavesdropping in this case was not carried out pursuant to such a warrant, and the convictions must therefore be reversed if *Katz* is to be applied to electronic surveillance conducted before the date of that decision. We have concluded, however, that to the extent *Katz* departed from previous holdings of this Court, it should be given wholly prospective application. Accordingly, and because we find no merit in any of the petitioners' other challenges to their convictions, we affirm the judgment before us.<sup>6</sup>

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<sup>6</sup> The only other issues which warrant mention relate to the Government's disclosure to the Court of Appeals of two instances of admittedly trespassory electronic surveillance affecting the petitioners. The Court of Appeals remanded the case to the District Court for a full evidentiary hearing on the subject matter of the disclosures. The first monitoring episode occurred during 1962-1963, when a device was installed in a Florida restaurant. The surveillance was directed at the owner of the restaurant rather than at any of the petitioners, but the petitioner Dioguardi was overheard talking about the operations of the restaurant. The log sheets covering the entire period of surveillance were turned over to the District Judge for *in camera* inspection, and those relating to any conversations of Dioguardi were furnished to the defense. The second instance was an attempted bugging of a rented car used by petitioners Nebbia, Desist, and Le Franc in furtherance of the conspiracy. Again all records pertaining to this episode were turned over to the defense.

District Judge Palmieri, after holding an extensive hearing at which the petitioners were granted unrestrained opportunity to introduce evidence and cross-examine witnesses, concluded that none of the "evidence used against [the petitioners] at the trial was tainted by any invasion of their constitutional rights." 277 F. Supp. 690, 700. Judge Palmieri found that the Dioguardi conversations overheard in 1962-1963 were totally unrelated to the

We are met at the outset with the petitioners' contention that *Katz* does not actually present a choice between prospective or retroactive application of new constitutional doctrine. The Court in that decision, it is said, did not depart from any existing interpretation of the Constitution, but merely confirmed the previous demise of obsolete decisions enunciating the distinction between "trespassory" searches and those in which there was no physical penetration of the protected premises. *Goldman v. United States*, 316 U. S. 129; *Olmstead v. United States*, 277 U. S. 438.<sup>6</sup> But this contention misconstrues our opinion in *Katz*. Our holding there that *Goldman* and *Olmstead* "can no longer be regarded as controlling," 389 U. S., at 353, recognized that those decisions had not been overruled until that day.<sup>7</sup> True, the principles they expressed had been modified. The belief that an oral conversation could not be the object of a "search" or "seizure" had not survived.<sup>8</sup> And in *Silverman v. United States*, 365 U. S. 505, we had cautioned that the scope of the Fourth Amendment could not be ascertained by resort to the "ancient niceties of tort or real property law." 365 U. S., at 511. But the assumption persevered that electronic surveillance did not offend the Constitution unless there was an "actual intrusion into a consti-

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events of the conspiracy, which transpired over two years later. With regard to the second instance, he found that the device installed in the rented car "did not function and that nothing coherent was obtained." *Id.*, at 692. The Court of Appeals held that these findings were supported by the evidence and that the petitioners were accorded all the procedural rights to which they were entitled. We agree. See *Alderman v. United States*, — U. S. —.

<sup>6</sup> See also *On Lee v. United States*, 343 U. S. 747.

<sup>7</sup> See also 389 U. S., at 362 (HARLAN, J., concurring); 389 U. S., at 367, 372 (BLACK, J., dissenting).

<sup>8</sup> See, e. g., *Wong Sun v. United States*, 371 U. S. 471, 485; *Lanza v. New York*, 370 U. S. 139, 142; *Silverman v. United States*, 365 U. S. 505; *Irvine v. California*, 347 U. S. 128.

tutionally protected area.”<sup>9</sup> While decisions before *Katz* may have reflected growing dissatisfaction with the traditional tests of the constitutional validity of electronic surveillance,<sup>10</sup> the Court consistently reiterated those tests and declined invitations to abandon them.<sup>11</sup> However clearly our holding in *Katz* may have been foreshadowed, it was a clear break with the past, and we are thus compelled to decide whether its application should be limited to the future.

Ever since *Linkletter v. Walker*, 381 U. S. 618, 629, established that “the Constitution neither prohibits nor requires retrospective effect” for decisions expounding new constitutional rules affecting criminal trials, the Court has viewed the retroactivity or nonretroactivity of such decisions as a function of three considerations. As we most recently summarized them in *Stovall v. Denno*, 388 U. S. 293, 297,

“[T]he criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.”<sup>12</sup>

Foremost among these factors is the purpose to be served by the new constitutional rule.<sup>13</sup> This criterion

<sup>9</sup> *Silverman v. United States*, *supra*, at 512.

<sup>10</sup> In *Katz*, 389 U. S., at 353, for example, we referred to our previous observation in *Warden v. Hayden*, 387 U. S. 294, 304, that “[t]he premise that property interests control the right of the Government to search and seize has been discredited.”

<sup>11</sup> See *Berger v. New York*, 388 U. S. 41, 44, 50–53, 64; *Clinton v. Virginia*, 377 U. S. 158; *Lopez v. United States*, 373 U. S. 427, 437–439; *Silverman v. United States*, 365 U. S. 505, 510–512.

<sup>12</sup> See also *DeStefano v. Woods*, 392 U. S. 631; *Johnson v. New Jersey*, 384 U. S. 719, 727; *Tehan v. Shott*, 382 U. S. 406, 413; *Linkletter v. Walker*, 381 U. S. 618, 629.

<sup>13</sup> See *Roberts v. Russell*, 392 U. S. 293, 295; *Witherspoon v. Illinois*, 391 U. S. 510, 523, n. 22.



strongly supports prospectivity for a decision amplifying the evidentiary exclusionary rule. Thus, it was principally the Court's assessment of the purpose of *Mapp v. Ohio*, 367 U. S. 643, which led it in *Linkletter* to deny those finally convicted the benefit of *Mapp's* extension of the exclusionary rule to the States:

"all of the cases . . . requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action. . . . We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police . . . has already occurred and will not be corrected by releasing the prisoners involved." 381 U. S., at 637.<sup>14</sup>

We further observed that, in contrast with decisions which had been accorded retroactive effect,<sup>15</sup> "there is no likelihood of unreliability or coercion present in a search and seizure case"; the exclusionary rule is but a "procedural weapon that has no bearing on guilt," and "the fairness of the trial is not under attack." 381 U. S., at 638-639. Following this reasoning of *Linkletter*, we

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<sup>14</sup> In other areas where retroactivity has been denied the "purpose" criterion offered much weaker support. Compare *Stovall v. Denno*, 388 U. S. 293, 298, where it was conceded that "the *Wade* and *Gilbert* rules also are aimed at avoiding unfairness at the trial by enhancing the reliability of the fact-finding process in the area of identification evidence"; *Johnson v. New Jersey*, 384 U. S. 719, 730, where it was recognized that "*Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation"; and *Tehan v. Shott*, 382 U. S. 406, 414, where it was stated that "the 'purpose' of the *Griffin* rule is to be found in the whole complex of values that the privilege against self-incrimination itself represents," including "our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.'" *Id.*, at 414, n. 12.

<sup>15</sup> *Jackson v. Denno*, 378 U. S. 368; *Gideon v. Wainwright*, 372 U. S. 335; *Griffin v. Illinois*, 351 U. S. 12.

recently held in *Fuller v. Alaska*, 393 U. S. 80, that the exclusionary rule of *Lee v. Florida*, 392 U. S. 378, should be accorded only prospective application. Analogizing *Lee* to *Mapp*, we concluded that evidence seized in violation of § 605 of the Federal Communications Act<sup>16</sup> was "no less relevant and reliable than that seized in violation of the Fourth Amendment," and that both decisions were merely "designed to enforce the federal law." 393 U. S., at 80.

The second and third factors—reliance of law enforcement officials, and the burden on the administration of justice that would flow from a retroactive application—also militate in favor of applying *Katz* prospectively. *Katz* for the first time explicitly overruled the "physical penetration" and "trespass" tests enunciated in earlier decisions of this Court. Our periodic restatements of those tests confirmed<sup>17</sup> the interpretation that police and courts alike had placed on the controlling precedents and fully justified reliance on their continuing validity. Nor had other courts theretofore held that the prohibitions of the Fourth Amendment encompassed "non-trespassory" electronic surveillance. On the contrary, only a few months before the eavesdropping in this case, the Court of Appeals for the Second Circuit had upheld the introduction of electronic evidence obtained by the same narcotics agent with a virtually identical installation. *United States v. Pardo-Bolland*, 348 F. 2d 316, cert. denied, 382 U. S. 944.

Although there apparently have not been many federal convictions based on evidence gathered by warrantless electronic surveillance,<sup>17</sup> we have no cause to doubt that

<sup>16</sup> 48 Stat. 1064, 47 U. S. C. § 605 (1964).

<sup>17</sup> The Government has informed us in its brief that "[i]nstead of a wholesale release of thousands of convicted felons, only a relatively small number would probably be affected [by a retroactive application of *Katz*], since electronic surveillance has played a part in a limited number of federal cases."

the number of state convictions obtained in reliance on pre-*Katz* decisions is substantial.<sup>18</sup> Moreover, the determination of whether a particular instance of eavesdropping led to the introduction of tainted evidence at trial would in most cases be a difficult and time-consuming task, which, particularly when attempted long after the event, would impose a weighty burden on any court. Cf. *Alderman v. United States*, — U. S. —, —. It is to be noted also that we have relied heavily on the factors of the extent of reliance and consequent burden on the administration of justice only when the purpose of the rule in question did not clearly favor either retroactivity or prospectivity.<sup>19</sup> Because the deterrent purpose of *Katz* overwhelmingly supports nonretroactivity, we would reach that result even if relatively few convictions would be set aside by its retroactive application.

The petitioners argue that even if *Katz* is not given fully prospective effect, at least it should govern those cases which, like the petitioners', were pending on direct review when *Katz* was decided. Petitioners point out that in *Linkletter*, the only other case involving the retroactivity of a Fourth Amendment decision, the Court held *Mapp* applicable to every case still pending on direct appeal on the date of that decision. A similar approach was adopted in *Tehan v. Shott*, 382 U. S. 406, with respect to the prospectivity of *Griffin v. California*, 380 U. S. 609. In *Johnson v. New Jersey*, 384 U. S. 719, however, we abandoned the approach taken in *Linkletter* and

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<sup>18</sup> We noted in *Berger v. United States*, 388 U. S. 41, 48-49, that only a handful of States have prohibited or regulated electronic surveillance by law enforcement officials.

<sup>19</sup> See *DeStefano v. Woods*, 392 U. S. 631; *Stovall v. Denno*, 388 U. S. 293; *Johnson v. New Jersey*, 384 U. S. 719. Compare the cases cited in n. 13, *supra*.

*Tehan* and concluded that "there are no jurisprudential or constitutional obstacles" to the adoption of a different cut-off point. *Id.*, at 733. We explained that

"[o]ur holdings in *Linkletter* and *Tehan* were necessarily limited to convictions which had become final by the time *Mapp* and *Griffin* were rendered. Decisions prior to *Linkletter* and *Tehan* had already established without discussion that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they were announced." 384 U. S., at 732.<sup>20</sup>

Here, on the other hand, as in *Johnson*, "the possibility of applying [*Katz*] only prospectively is yet an open issue." *Ibid.*

All of the reasons for making *Katz* retroactive also undercut any distinction between final convictions and those still pending on review. Both the deterrent purpose of the exclusionary rule and the reliance of law enforcement officers focus upon the time of the search, not any subsequent point in the prosecution, as the relevant date. Exclusion of electronic eavesdropping evidence seized before *Katz* would increase the burden on the administration of justice, would overturn convictions based on fair reliance upon pre-*Katz* decisions, and would

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<sup>20</sup>In *Linkletter* itself the Court noted that it dealt only with the narrow issue whether *Mapp* should be applied to final as well as nonfinal convictions:

"[*Mapp*] has also been applied to cases still pending on direct review at the time it was rendered. Therefore, in this case, we are concerned only with whether the exclusionary principle enunciated in *Mapp* applies to state court convictions which had become final before rendition of our opinion." 381 U. S., at 622.

*Mapp* had already been applied in *Ker v. California*, 374 U. S. 23; *Fahy v. Connecticut*, 375 U. S. 85; *Stoner v. California*, 376 U. S. 483. *Griffin* had been applied in *O'Connor v. Ohio*, 382 U. S. 286, shortly before *Tehan* was decided.

not serve to deter similar searches and seizures in the future.

Nor can it sensibly be maintained that the Court is foreclosed by *Linkletter* in this case, as it was not in *Johnson*, simply because *Katz*, like *Mapp*, was a Fourth Amendment decision.<sup>21</sup> In neither *Linkletter* nor *Johnson* was it intimated that the cut-off points there adopted depended in any degree on the constitutional provision involved. There is, moreover, a significant distinction between the *Mapp* and *Katz* decisions. *Mapp* dealt solely with the applicability of the exclusionary rule to the States; "the situation before *Mapp* . . . [was that] the States at least knew that they were constitutionally forbidden from engaging in unreasonable searches and seizures under *Wolf v. Colorado*, 338 U. S. 25 (1949)." <sup>22</sup> Before *Katz* on the other hand, "non-trespassory" electronic surveillance was not thought to fall within the reach of the Fourth Amendment.<sup>23</sup> Therefore, this case lacks whatever impetus the knowingly unconstitutional conduct by the States may have provided in *Linkletter* to apply *Mapp* to all pending prosecutions.

In sum, we hold that *Katz* is to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18,

<sup>21</sup> Actually, *Mapp* was, of course, decided under the Fourth and Fourteenth Amendments, with one member of the five-man majority relying at least in part on the Fifth Amendment. 367 U. S., at 661-666 (BLACK, J., concurring).

<sup>22</sup> *Johnson v. New Jersey*, 384 U. S. 719, 731. And see *Tehan v. Shott*, 382 U. S. 406, 417.

<sup>23</sup> Indeed, since the Fourth Amendment prohibits only unreasonable searches and seizures, it could be argued that there was, in fact, no Fourth Amendment violation in the present case. The law enforcement officers could certainly be said to have been acting "reasonably" in measuring their conduct by the relevant Fourth Amendment decisions of this Court. Cf. *Katz v. United States*, 389 U. S. 347, 356; *James v. United States*, 366 U. S. 213, 221-222, 245.



1967.<sup>24</sup> Since the eavesdropping in this case occurred before that date and was consistent with pre-Katz decisions of this Court, the convictions must be

*Affirmed.*

MR. JUSTICE BLACK, while adhering to his dissent in *Linkletter v. Walker*, 381 U. S. 618, 640 (1965), concurs in the affirmance of the judgment of conviction in this case for the reasons stated in his dissenting opinion in *Katz v. United States*, 389 U. S. 347, 364 (1967).

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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<sup>24</sup> The dissenting opinion of MR. JUSTICE FORTAS suggests that our holding today "denies the benefit of a fundamental constitutional provision, and not merely of court-made rules implementing a constitutional mandate." *Post*, at —. To the contrary, we simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served. The exclusionary rule "has no bearing on guilt" or "the fairness of the trial." *Linkletter v. Walker*, 381 U. S., at 638-639.

Of course, Katz himself benefited from the new principle announced on that date, and, as our Brother DOUGLAS observes, to that extent the decision has not technically been given wholly prospective application. But, as we recently explained in *Stovall v. Denno*, 388 U. S. 293, 301, the fact that the parties involved in the decision are the only litigants so situated who receive the benefit of the new rule is "an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." Whatever inequity may arguably result from applying the new rule to those "chance beneficiaries" is "an insignificant cost for adherence to sound principles of decision-making." *Ibid*.



# SUPREME COURT OF THE UNITED STATES

No. 12.—OCTOBER TERM, 1968.

Samuel Desist et al., Petitioners, v. United States.	}	On Writ of Certiorari to the United States Court of Ap- peals for the Second Circuit.
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[March 24, 1969.]

MR. JUSTICE DOUGLAS, dissenting.

It is a mystery to me why *Katz v. United States*, 389 U. S. 347, which was given retroactive effect to petitioner Katz will not be given retroactive effect to petitioner, Desist. That does not seem to me to be the administration of justice with an even hand. I would understand today's ruling if in *Katz* we had announced a new constitutional search and seizure rule to be applied prospectively in all cases. But we did not do that; nor did we do it in other recent cases announcing variations of old constitutional doctrine. The most notorious example is *Miranda v. Arizona*, 384 U. S. 436, where, as I recall, some 80 cases were presented raising the same question. We took four of them and held the rest and then reversed each of the four, applying the new procedural rule retroactively. But as respects the rest of the pending cases we denied any relief. *Johnson v. New Jersey*, 384 U. S. 719. Yet it was sheer coincidence that those precise four were chosen. Any other single case in the group or any other four would have been sufficient for our purposes.

All this, and more, was stated by MR. JUSTICE BLACK in his dissent in *Linkletter v. Walker*, 381 U. S. 618, 640, in which I concurred. It is stated again with clarity and vigor by MR. JUSTICE HARLAN in today's dissent, Part I of which I join. It still remains a mystery how

some convicted people are given new trials for unconstitutional convictions and others are kept in jail without any hope of relief though their complaint is equally meritorious. At least the Court should not say as respects *Katz* that it is given "wholly prospective application," when it was made retroactive in his case.

The pretense that we were bound in *Katz* to apply the new rule retroactively to that defendant or not decide the case at all, is too transparent to need answer. See 1 Moore, Federal Practice 191 (2d ed. 1965); 1 Davis, Administrative Law Treaties § 5.09 (1958); Levy, Realist Jurisprudence & Prospective Overruling, 109 U. Pa. L. Rev. 1, 15; Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va. L. Rev. 201, 216-234 (1965).

In *Johnson v. New Jersey*, 385 U. S. 719, 733, where we announced that the rule in *Miranda* should apply only to cases commenced after that decision had been announced, we said:

"there are no jurisprudential or constitutional obstacles to the rule we are adopting here. . . . In appropriate prior cases we have already applied new judicial standards in a wholly prospective manner. See *England v. Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964); *James v. United States*, 366 U. S. 213 (1961)."

Where the spirit is strong, there has heretofore been no impediment to producing only dictum through a "case or controversy." Indeed the contrary tradition started with *Marbury v. Madison*, 1 Cranch 137.

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[March 24, 1969.]

MR. JUSTICE HARLAN, dissenting.

In the four short years since we embraced the notion that our constitutional decisions in criminal cases need not be retroactively applied, *Linkletter v. Walker*, 381 U. S. 618 (1965),<sup>1</sup> we have created an extraordinary collection of rules to govern the application of that principle. We have held that certain "new" rules are to be applied to all cases then subject to direct review, *Linkletter v. Walker*, *supra*; *Tehan v. Shott*, 382 U. S. 416 (1966); certain others are to be applied to all those cases in which trials have not yet commenced, *Johnson v. New Jersey*, 384 U. S. 719 (1966); certain others are to be applied to all those cases in which the tainted evidence has not yet been introduced at trial, *Fuller v. Alaska*, 393 U. S. 80 (1968); and still others are to be applied only to the petitioner involved in the case in which the new rule is announced and to all future cases in which the proscribed official conduct has not yet occurred. *Stovall v. Denno*, 388 U. S. 293 (1967); *DeStefano v. Woods*, 392 U. S. 631 (1968).

Although it has more than once been said that "new" rules affecting "the very integrity of the fact-finding process," are to be retroactively applied, *Linkletter v. Walker*, 381 U. S., at 639; see also *Tehan v. Shott*, 382

<sup>1</sup> In one instance this doctrine has been applied to a nonconstitutional decision. See *Lee v. Florida*, 392 U. S. 378 (1968), and its aftermath, in *Fuller v. Alaska*, 393 U. S. 80 (1968).



U. S., at 416; *Fuller v. Alaska*, 393 U. S., at 81, this requirement was eroded to some extent in *Johnson v. New Jersey*, 384 U. S., at 728-729, and yet further in *Stovall v. Denno*, 388 U. S., at 299; see also *DeStefano v. Woods*, *supra*. Again, although it has been said that a decision will be retroactively applied when it has been "clearly foreshadowed in our prior case law," *Johnson v. New Jersey*, *supra*, at 731; *Berger v. California*, — U. S. — (1969), the Court today rejects such a contention. *Ante*, at 5. Indeed, the Court now also departs from pre-existing doctrine in refusing retroactive application within the federal system of the "new" rule ultimately laid down in *Katz v. United States*, 389 U. S. 347 (1967), despite its concession that "relatively few" federal cases would have to be reconsidered. Compare *ante*, at 8, with *Linkletter v. Walker*, *supra*, at 637; *Tehan v. Shott*, *supra*, at 418-419; *Johnson v. New Jersey*, *supra*, at 731-732; *Stovall v. Denno*, *supra*, at 300.

I have in the past joined in some of those opinions which have, in so short a time, generated so many incompatible rules and inconsistent principles. I did so because I thought it important to limit the impact of constitutional decisions which seemed to me profoundly unsound in principle. I can no longer, however, remain content with the doctrinal confusion that has characterized our efforts to apply the basic *Linkletter* principle. "Retroactivity" must be rethought.

## I.

### RETROACTIVITY ON DIRECT REVIEW.

Upon reflection, I can no longer accept the rule first announced two years ago in *Stovall v. Denno*, *supra*, and reaffirmed today, which permits this Court to apply a "new" constitutional rule entirely prospectively, while making an exception only for the particular litigant whose case was chosen as the vehicle for establishing that

rule. Indeed, I have concluded that *Linkletter* was right in insisting that all "new" rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the "new" decision is handed down.

Matters of basic principle are at stake. In the classical view of constitutional adjudication, which I share, criminal defendants cannot come before this Court simply to request largesse. This Court is entitled to decide constitutional issues only when the facts of a particular case require their resolution for a just adjudication on the merits. See *Marbury v. Madison*, 1 Cranch 137 (1803). We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the Government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a "new" rule of constitutional law.

The unsound character of the rule reaffirmed today is perhaps best exposed by considering the following hypothetical. Imagine that the Second Circuit in the present case had anticipated the line of reasoning this Court subsequently pursued in *Katz v. United States*, *supra*, at 352-353, concluding—as this Court there did—that "the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling." *Id.*, at 353. Would we have reversed the case on the ground that the principles the Second Circuit had announced—though identical with those in *Katz*—should not control because

*Katz* is not retroactive? To the contrary, I venture to say that we would have taken satisfaction that the lower court had reached the same conclusion we subsequently did in *Katz*. If a "new" constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced. Anything else would belie the truism that it is the task of this Court, like that of any other, to do justice to each litigant on the merits of his own case. It is only if each of our decisions can be justified in terms of this fundamental premise that they may properly be considered the legitimate products of a court of law, rather than the commands of a super-legislature.

Re-examination of prior developments in the field of retroactivity leads me irresistably to the conclusion that the only solid disposition of this case lies in vacating the judgment of the Court of Appeals and in remanding this case to that court for further consideration in light of *Katz*.

## II.

### RETROACTIVITY ON HABEAS CORPUS.

What has already been said is, from my standpoint, enough to dispose of the case before us. Ordinarily I would not go further. But in this instance I consider it desirable and appropriate to venture some observations on the application of the retroactivity doctrine in habeas corpus cases, under the prevailing scope of the "Great Writ" as set forth in this Court's 1963 decision in *Fay v. Noia*, 372 U. S. 391, and in today's decision in *Kaufman v. United States*, — U. S. —. I believe this course is fitting because none of the Court's prior retroactivity decisions has faced up to the quite different factors which should govern the application of retroactivity in habeas corpus cases; because the retroactive application of *Katz*

in habeas corpus cases would seem to be foreclosed by the present decision; because principled habeas retroactivity now seems to me to demand much more than the "purpose," "reliance," and judicial "administration" standards, *antè*, at 5, which have so far been regarded as the tests governing retroactivity in direct review and habeas corpus cases alike; and because the retroactivity doctrine is still in a developing stage. In what ensues I shall simply try to suggest some of the considerations which appear to me to lay bare the complexities of the retroactivity problem on habeas which I feel have not been sufficiently explored in past decisions, leaving expression of definitive views upon any of such considerations for future habeas cases to which they are germane.

## A.

While, as I have argued, a reviewing court has the obligation to rule upon every decisive issue properly raised by the parties on direct review, the federal courts have never had a similar obligation on habeas corpus. Indeed, until *Brown v. Allen*, 344 U. S. 443 (1953), federal courts would never consider the merits of a constitutional claim if the habeas petitioner had a fair opportunity to raise his arguments in the original proceeding.<sup>2</sup> See my dissent in *Fay v. Noia*, *supra*, at 449-463; see also Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 463 (1963). With habeas restricted in this way, the question of applying a "new" constitutional rule to convictions

<sup>2</sup> An exception to this general rule was made, however, when the habeas petitioner attacked the constitutionality of the state statute under which he had been convicted. See, e. g., *Ex parte Siebold*, 100 U. S. 371 (1879). Since, in this situation, the State had no power to proscribe the conduct for which the petitioner was imprisoned, it could not constitutionally insist that he remain in jail.

which had become final arose so infrequently that the retroactivity issue could not be considered a significant one in those days. Even under *Brown*, the retroactive application of "new" rules in habeas cases did not serve to erode the finality of criminal judgments to any substantial degree. It was the rare case in which the habeas petitioner had raised a "new" constitutional argument both at his original trial and on appeal. Yet it was only in such a case that *Brown* would permit a habeas court to apply the "new" rule. Cf. *Sunal v. Large*, 332 U. S. 174 (1947).

The conflict between retroactivity and finality only became of major importance with the Court's decision in *Fay v. Noia*, *supra*. For the first time, it was there held that, at least in some instances, a habeas petitioner could successfully attack his conviction collaterally despite the fact that the "new" rule had not even been suggested in the original proceedings. Thus, *Noia* opened the door for large numbers of prisoners to relitigate their convictions each time a "new" constitutional rule was announced by this Court.

I continue to believe that *Noia*, which has been given even broader scope in *Kaufman v. United States*, — U. S. — (1969), constitutes an indefensible departure both from the historical principles which defined the scope of the "Great Writ" and from the principles of federalism which have formed the bedrock of our constitutional development. Nevertheless, my views on this score have not prevailed, and pending re-examination of the scope of habeas corpus, I believe myself obliged to consider on its own bottom the retroactivity problem which *Noia* has spawned, since it is a matter of the greatest importance if the integrity of the federal judicial process is to be maintained in this era of increasingly rapid constitutional change.



## B.

The greatly expanded writ of habeas corpus seems at the present time to serve two principal functions. See *Kaufman v. United States*, — U. S. —, —, and n. 9; Mishkin, Foreword: The High Court, The Great Writ and the Due Process of Time and Law, 79 Harv. L. Rev. 56, 77-101 (1965). First, it seeks to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted. It follows from this that all "new" constitutional rules which significantly improve the pre-existing fact-finding procedures are to be retroactively applied on habeas. See my Brother BLACK's dissent in *Kaufman v. United States*, *supra*, at —. The new habeas, however, is not only concerned with those rules which substantially affect the fact-finding apparatus of the original trial. Under the prevailing notions, *Kaufman v. United States*, *supra*, at —, the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function, the habeas court need not, as prior cases make clear, necessarily apply all "new" constitutional rules retroactively. In these cases, the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place.

The theory that the habeas petitioner is entitled to the law prevailing at the time of his conviction is, however, one which is more complex than the Court has seemingly recognized. First, it is necessary to determine whether a particular decision has really announced a "new" rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been

previously considered in the prior case law. Only a short time ago, for example, we attempted to define with more precision the conditions governing the issuance of a search warrant under the Fourth Amendment. *Spinelli v. United States*, — U. S. — (1969). While we had never previously encountered the precise situation raised in *Spinelli*, our decision in that case rested upon the established doctrine that a magistrate may issue a warrant only when he can judge for himself the validity of the affiant's conclusion that criminal activity is involved. *Johnson v. United States*, 333 U. S. 10, 14 (1948); *Aguilar v. Texas*, 378 U. S. 108 (1964). Surely, it could not be thought that *Spinelli* should not be retroactively applied under the expanded habeas process because it was not announced until 1969. One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation. In such a context it appears very difficult to argue against the application of the "new" rule in all habeas cases since one could never say with any assurance that this Court would have ruled differently at the time the petitioner's conviction became final.

In the *Katz* case, however, one can say with assurance that there was a time at which this Court would have ruled differently. For in *Olmstead*, *Goldman*, and *On Lee*,<sup>3</sup> the Court did just that. Even under the prevailing view of habeas, this fact should be of significance. Although the threat of collateral attack may be necessary to assure that the lower federal and state courts toe the

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<sup>3</sup> *Olmstead v. United States*, 277 U. S. 438 (1928); *Goldman v. United States*, 316 U. S. 129 (1942); *On Lee v. United States*, 343 U. S. 747 (1952).

constitutional line, the lower courts cannot be faulted when, following the doctrine of *stare decisis*, they apply the rules which have been authoritatively announced by this Court. If anyone is responsible for changing these rules, it is this Court.

Even in this situation, however, the doctrine of *stare decisis* cannot always be a complete answer to the retroactivity problem if a habeas petitioner is really entitled to the constitutional law which prevailed at the time of his conviction. Consider, for example, the state of Fourth Amendment law as it existed after our decision in *Silverman v. United States*, 365 U. S. 505 (1961). As my Brother STEWART notes today, *ante*, at 4, *Silverman* went a long way toward rejecting the principles supporting the *Goldman* and *Olmstead* rules. The Court in *Silverman* cautioned that the scope of the Fourth Amendment's protection is "not inevitably measurable in terms of ancient niceties of tort or real property law." *Id.*, at 511. The majority's opinion concluded with the warning: "We find no occasion to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch." *Id.*, at 512. It is hard to believe that any lawyer worthy of the name could, after reading *Silverman*, rely with confidence on the continuing vitality of the *Goldman* rule. Nor is it by any means clear to me that it would have been improper for a lower court to have declined to follow *Goldman* in the light of *Silverman*.<sup>4</sup> Given the deterrence purpose of the expanded

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<sup>4</sup> After *Silverman* was decided, we were careful to frame our decisions in such a way that a direct consideration of the "trespass" doctrine could be avoided. In *Lopez v. United States*, 373 U. S. 427, 439 (1963), we noted that "The validity of [*Olmstead* and *Goldman*] is not in question here. Indeed this case involves no 'eavesdropping' whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, the device was used to obtain the most reliable evidence possible of a con-

habeas corpus, it thus could be persuasively argued that the *Katz* rule should be applied to all cases which had not become final at the time *Silverman* was decided.<sup>5</sup>

## C.

*Katz*, of course, has been one of the lesser innovations of a decade that has witnessed revolutionary changes in the most fundamental premises of hitherto accepted constitutional law. And similar difficulties arise as to

versation in which the Government's own agent was a participant. . . ." In *Berger v. New York*, 388 U. S. 41, the Court found that New York's eavesdropping statute contained impermissibly vague standards even with regard to the authorization of electronic surveillance requiring a trespass. It concluded that "[t]his disposition obviates the necessity for any discussion of the other points raised." *Id.*, at 44. Moreover, *Berger* made it clear that we had rejected *Olmstead's* declaration that the Fourth Amendment did not protect the integrity of private conversations. Such an action would hardly strengthen a lawyer's or lower court's confidence in the continuing vitality of the "trespass" doctrine, which is also rooted in *Olmstead*.

Finally, the Court's suggestion that our unexplicated *per curiam* reversal in *Clinton v. Virginia*, 377 U. S. 158 (1964), was premised upon the "trespass" doctrine, see *ante*, at 5, n. 11, is not supported by the opinion in that case. Only Mr. Justice Clark expressly predicated his decision upon the doctrine. The other seven members of the majority did not state the ground upon which the reversal was based.

<sup>5</sup> While I do not question much that my Brother FORTAS says in his dissenting opinion, I am unable to adopt the extreme position on retroactivity he proposes. Before *Silverman* was decided in 1961, no decision of this Court had undermined the conceptual basis of the *Olmstead* rule. Before 1961, even the most conscientious police department or judge had no reason to doubt the validity of the "trespass" rule. Nevertheless, Mr. JUSTICE FORTAS would grant habeas corpus to prisoners whose convictions became final before *Silverman*. This result cannot be justified even if one assumes that it is proper for a habeas court to require "conceptual faithfulness" to our opinions and "not merely decisional obedience" to the rules they announce. See *post*, at 9.



the retroactive application of the Court's other landmark decisions if one is to insist that a habeas petitioner is entitled to the law as it stood at the time of his conviction. It is possible to argue, for example, that the Court's decision in *Mapp v. Ohio*, 367 U. S. 643 (1961), imposing the exclusionary rule on the States, was a sufficient indication to the lower courts that they should no longer rely on the doctrine of *stare decisis* when confronted with the claim that other Bill of Rights guarantees should be incorporated into the Due Process Clause of the Fourteenth Amendment. It would follow from this position that all subsequent decisions incorporating various other provisions of the Bill of Rights into Due Process should be applied to all cases arising on habeas which were pending on appeal at the time *Mapp* was decided.

On the other hand, one could argue that *stare decisis* was still the appropriate rule for the lower courts until this Court made it clear that a particular guarantee was applicable to the States. It would follow from this position that the Court's decision in *Griffin v. California*, 380 U. S. 609 (1965), should be retroactively applied only to *Mallory v. Hogan*, 378 U. S. 1 (1964), which was the first case beginning the process of incorporating the Fifth Amendment's privilege against self-incrimination, and that *Duncan v. Louisiana*, 391 U. S. 145 (1968), should not be applied to any of those cases which had become final before that decision required the States to provide criminal jury trials on the same basis as the Federal Government.

Neither of these positions would be squarely inconsistent with the Court's new view of habeas corpus. Indeed, if the Court in *Mapp* had given any indication whatever that it accepted my Brother BLACK's "incorporationist" philosophy in its pristine purity, see *Adamson v. California*, 332 U. S. 46, 68-123 (1947), it would



appear that it would have been improper for the lower courts to rely on the old precedents to respond to the new claims advanced by criminal defendants. However, the Court has never accepted MR. JUSTICE BLACK's constitutional premises in full-blown form. Instead, it has embarked on a course of "selective incorporation" in which the nature of each particular Bill of Rights guarantee has been examined before it was imposed upon the States. Given the *ad hoc* character of this approach, and given the fundamental place of federalism in the traditional conception of constitutional adjudication, it could certainly be strongly argued that the lower courts could properly follow the traditional Due Process approach until the time this Court made it clear that a particular Bill of Rights guarantee had been incorporated.

The relationship for retroactivity purposes between the *Escobedo*, *Miranda*, *Wade*, and *Gilbert* decisions,\* presents another difficult problem under the new habeas corpus concept. It can be argued that the "line-up" cases, *Wade* and *Gilbert*, should be retroactively applied to all those cases pending when *Miranda* was decided. Since *Miranda* placed affirmative requirements upon police officers to assure that the accused would have an opportunity to obtain counsel at one "critical stage" of the criminal process, neither police officials nor the lower courts, it might be argued, could properly assume that other critical stages would not be comparably treated. Similarly, it may be suggested that the rules announced in both *Miranda* and the "line-up" cases should be applied to all cases still pending on appeal when *Escobedo v. Illinois* announced that the Sixth Amendment applied in the police station. For *Gideon v. Wainwright*,

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\* *Escobedo v. Illinois*, 378 U. S. 478 (1964); *Miranda v. Arizona*, 384 U. S. 436 (1966); *United States v. Wade*, 388 U. S. 218 (1967); *Gilbert v. California*, 388 U. S. 263 (1967).

372 U. S. 478 (1964), had already established the proposition that the State must provide free counsel to indigents at the criminal trial.

It is doubtless true that a habeas court encounters difficult and complex problems if it is required to chart out the proper implications of the governing precedents at the time of a petitioner's conviction. One may well argue that it is of paramount importance to make the "choice of law" problem on habeas as simple as possible, applying each "new" rule only to those cases pending at the time it is announced. While this would obviously be simpler, simplicity would be purchased at the cost of compromising the principle that a habeas petitioner is to have his case judged by the constitutional standards dominant at the time of his conviction.

I do not pretend to have exhausted in the foregoing discussion all the complexities of the retroactivity problem on habeas. But the considerations I have canvassed suggest that we should take a hard look at where we are going in the retroactivity field so that this new doctrine may be administered in accordance with the basics of the judicial tradition. Unfortunately, the Court does not even attempt this task.

For the reasons stated in Part I of this opinion I cannot subscribe to the affirmation ~~of the judgment~~ of the Court of Appeals. I would remand the case to that court for reconsideration in light of *Katz v. United States*.



# SUPREME COURT OF THE UNITED STATES

Nos. 12 AND 62.—OCTOBER TERM, 1968.

Samuel Desist et al., Petitioners, 12 v. United States.	}	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
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Thomas R. Kaiser, Petitioner, 62 v. New York.	}	On Writ of Certiorari the Court of Appeals of New York.
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[March 24, 1969.]

MR. JUSTICE FORTAS, dissenting.

The decisions today in *Kaiser v. New York* and *Desist v. United States* apply to only the limited number of cases where the constitutionally forbidden wiretap or eavesdropping occurred prior to December 18, 1967. It was on that day that we decided *Katz v. United States*, 389 U. S. 347, which administered the formal *coup de grace* to the moribund doctrine of *Olmstead v. United States*, 277 U. S. 438 (1928). The Court in effect grants absolution to police invasions of individual privacy by wiretaps and electronic devices not involving physical trespass, as long as the unconstitutional conduct took place before *Katz*. It holds that only from and after *Katz* will it apply the Fourth Amendment's command without reference to whether a physical trespass was involved. The significance of the decisions is not only that they deprive a relatively few convicted persons of their constitutional rights, but also that they diminish the Constitution; they imply that the availability of constitutional principle can be the subject of judicial choice in circumstances which, I respectfully submit, are far from compelling. I cannot agree.

The Court says that it has authority to determine whether a ruling will be made "retroactive," and it gives several reasons for its decision not to apply *Katz* "retroactively": (1) *Katz* "was a clear break with the past" because it repudiated *Olmstead's* requirement of a physical trespass into the accused's home or office, *ante*, at —; (2) the purpose of *Katz's* rule excluding evidence even where there was no physical intrusion was to deter police invasion of constitutional rights, a purpose that would not be aided by "retrospective" application of the ruling; (3) police and courts alike, until *Katz*, justifiably relied upon the continuing vitality of *Olmstead*; and (4) it would unduly burden law administration to apply *Katz* "retroactively." The Court derives these factors from various of its decisions, commencing with *Linkletter v. Walker*, 381 U. S. 618 (1965),<sup>1</sup> in which

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<sup>1</sup> *Linkletter* held that the Court's decision in *Mapp v. Ohio*, 367 U. S. 643 (1961), that illegally-seized evidence was not admissible in state prosecutions, should not be applied "retroactively." In *Tehan v. Shott*, 382 U. S. 406 (1966), the Court held that its decision in *Griffin v. California*, 380 U. S. 609 (1965), that it violates the privilege against self-incrimination for the prosecution or the trial judge to comment on a criminal defendant's failure to testify in his defense, should not apply "retroactively." *Johnson v. New Jersey*, 384 U. S. 719 (1966), held that *Escobedo v. Illinois*, 378 U. S. 478 (1964), and *Miranda v. Arizona*, 384 U. S. 436 (1966), should not apply "retroactively." *Stovall v. Denno*, 388 U. S. 293 (1967), held that *United States v. Wade*, 388 U. S. 218 (1967), and *Gilbert v. California*, 388 U. S. 263 (1967), both of which related to the right to counsel at a pretrial lineup, should not be applied "retroactively." In *DeStefano v. Woods*, 392 U. S. 631 (1968), the Court held that the right to trial by jury in state criminal prosecutions that had been established in *Duncan v. Louisiana*, 391 U. S. 145 (1968), and *Bloom v. Illinois*, 391 U. S. 194 (1968), was not "retroactive." Finally, the Court held in *Fuller v. Alaska*, 393 U. S. 80 (1968), that *Lee v. Florida*, 392 U. S. 378 (1968), was not "retroactive." *Lee* ruled that evidence obtained in violation of § 605 of the Federal Communications Act of 1934, 48 Stat. 1103, 47 U. S. C. § 605, was inadmissible in state criminal prosecutions.



decisions of this Court have been held to apply prospectively only.<sup>2</sup>

In my judgment the Court's holding is of pervasive importance because it adds new and unhappy dimensions to the "non-retroactivity" doctrine. The Court not only denies the benefit of a fundamental constitutional provision, and not merely of court-made rules implementing a constitutional mandate<sup>3</sup> or of a statutory principle,<sup>4</sup> to a class of persons because of the chance operation of the judicial calendar, it does so in face of the fact that the ruling at issue is neither novel nor unanticipated. The Court's statement to the contrary is, as I shall discuss, simply insupportable.

### I.

I do not challenge this Court's power to decline to apply newly-devised rules implementing constitutional

<sup>2</sup> The meaning of "prospectivity" or "non-retroactivity" has varied in the Court's decisions. In *Linkletter v. Walker*, *supra*, n. 1, and *Tehan v. Shott*, *supra*, n. 1, *Mapp* and *Griffin* were said not to apply to convictions that had become final prior to the announcement of those decisions. But *Mapp* and *Griffin* were applied to cases pending on direct review at the time of those decisions. *Johnson v. New Jersey*, *supra*, n. 1, by contrast, held *Miranda* and *Escobedo* applicable only to trials begun after *Miranda* and *Escobedo* were announced. *Stovall v. Denno*, *supra*, n. 1, held that the *Wade* and *Gilbert* decisions should apply only to cases in which the illegal official conduct took place after the date of decision. *DeStefano v. Woods*, *supra*, n. 2, held that *Duncan* and *Bloom* should apply only to cases where the trial commenced after the date of decision, a date which, since these cases involved the right to jury trial, was apt to coincide with the date of the official conduct. *Fuller v. Alaska*, *supra*, n. 1, held that *Lee v. Florida*, *supra*, n. 1, would apply only in cases in which the illegally-obtained evidence was introduced after the date of decision. In all of these cases, the new rule was applied also in the case in which it was announced.

<sup>3</sup> Cf. *Miranda v. Arizona*, 384 U. S. 436 (1966) (rules concerning in-custody interrogation); *Mapp v. Ohio*, 367 U. S. 643 (1961) (exclusionary rule).

<sup>4</sup> Cf. *Fuller v. Alaska*, 393 U. S. 80 (1968).

principles to prior cases or situations, or its authority to make similar accommodation when it changes long-standing statutory interpretations. Most of the Court's "nonretroactivity" holdings have emerged in state cases dealing with the application of a ruling that was relatively unpressaged and the practical effect of which, if applied to the past as well as the future, would be acutely disruptive of state practice and institutions. In those cases the pressures of comity and the hesitancy drastically to nullify state actions lent special force to the demand that the decision should not be applied "retroactively." In *DeStefano v. Woods*, 392 U. S. 631 (1968), for example, these circumstances were deemed to warrant only prospective application of the right to trial by jury in state prosecutions that was established in *Duncan v. Louisiana*, 391 U. S. 145 (1968), and *Bloom v. Illinois*, 391 U. S. 194 (1968).

The Court so held even though it thereby let stand convictions that had been rendered pursuant to a faulty reading of the Constitution. Even where considerations that favor "non-retroactivity" exist, however, a new constitutional rule will not always be "non-retroactively" applied. The Court has insisted that all persons; not just those selected by the chance of the calendar, receive the benefit of newly-declared constitutional commands that are central to the reliability of the fact-finding process at trial and without which innocent persons may have been adjudged guilty. See, e. g., *Roberts v. Russell*, 392 U. S. 293 (1968) (holding retroactive *Bruton v. United States*, 391 U. S. 123 (1968)); *McConnell v. Rhay*, 393 U. S. 2 (1968) (holding retroactive *Mempa v. Rhay*, 389 U. S. 128 (1967)); *Arsenault v. Massachusetts*, 393 U. S. 5 (1968) (holding retroactive *White v. Maryland*, 373 U. S. 59 (1957)); *Berger v. California*, 393 U. S. 314 (1969) (holding retroactive *Barber*

v. *Page*, 390 U. S. 719 (1968)); *Gideon v. Wainwright*, 372 U. S. 335 (1963); *Griffin v. Illinois*, 351 U. S. 12 (1956); *Jackson v. Denno*, 378 U. S. 368 (1964).

In the present cases, the Court decides that the lawfulness of wiretaps and electronic eavesdropping occurring before December 18, 1967, will be controlled by *Olmstead v. United States*, *supra*, a decision that the Court agrees is a false and insupportable reading of the Constitution. The Court holds that the Fourth Amendment meant something quite different before *Katz* was decided than it means afterwards; that *Katz* and persons whose rights are violated after the date of that decision may have the benefit of the true meaning of the constitutional provision, but that those who were victims before *Katz* may not.

If such a distinction in the application of a substantive constitutional principle can ever be justified, it can be only in the most compelling circumstances. Such circumstances might possibly exist if the newly-announced principle related only to the States, in that it extended to the States a principle heretofore deemed to apply only to the Federal Government, or if "retroactive" application would place an extreme burden on the administration of justice; if the new ruling were wholly unanticipated in the decisions of the Court; and if the new rule did not directly and clearly affect the fairness of the trial. Cf. *DeStefano v. Woods*, *supra*; *Johnson v. New Jersey*, 384 U. S. 719 (1966); *Linkletter v. Walker*, *supra* (1961). But there is no justification for refusing "retroactive" application to a constitutional principle merely because of an earlier reading of the Constitution that had been widely repudiated as unsound and that this Court's own intervening opinions had discredited, although not expressly overruled. *Olmstead* is in this category. *Katz* did no more than administer the *coup de grace* to its

moribund doctrine. The action of the Court today cannot be justified by claiming that it is required by *Olmstead's* continued vitality. On the contrary, the Court today breathes life into *Olmstead's* corpse.

## II.

In *Kaiser v. New York*, the Court affirms a state conviction despite the fact that the conviction was based upon telephone conversations that the police had recorded by a wiretap. The petitioner made the telephone calls to a co-conspirator at a bar in Manhattan. The police had installed a wiretap device in the terminal box in the building where the bar was located.

The taps were made pursuant to a warrant issued under a New York statute. The warrant cannot, however, support the use of the wiretap evidence, for in *Berger v. New York*, 388 U. S. 40, decided on June 12, 1967, we held that the New York statute did not comply with Fourth Amendment requirements. The Court's decision rests instead on the fact that the petitioner's conversations were intercepted and recorded without a trespass and on the assertion that the *Olmstead* doctrine was fully viable at the time that the petitioner's telephone conversations were overheard.

In *Desist v. United States*, the federal case decided today, the federal agents attached the "uninvited ear" of the microphone to the outer instead of the inner panel of the double door separating their hotel room from that of the petitioners. Because of this distinction, their conduct is today held to be immunized from Fourth Amendment attack. *Olmstead* would sanction the differentiation. If the microphone had been attached to the inner panel, or if the agents had used a device that impinged by 1/1000th of an inch upon the room rented by petitioners, *Olmstead* would not have sanctified the

result. See *Silverman v. United States*, 365 U. S. 505 (1961).<sup>5</sup>

This distinction is, of course, nonsense, as I suppose most rational persons would agree; and I am unwilling to suppose that if the majority in *Olmstead* had foreseen the ensuing development and uninhibited use of electronic devices for searching out and seizing the words of others, it would have nevertheless allowed the perimeter of physical property rights to limit the Fourth Amendment's protection of citizens' privacy from unseen invasion.

In any event, there is no doubt that *Olmstead* was thoroughly repudiated by this Court long before December 18, 1967, when *Katz* was decided. *Katz* is not responsible for killing *Olmstead*. Prior cases had left the physical-trespass requirement of *Olmstead* virtually lifeless and merely awaiting the death certificate that *Katz* gave it. They demonstrated to all who were willing to receive the message that *Olmstead* would not shield eavesdropping because it took place outside the physical property line. *Silverman v. United States*, *supra*; *Clinton v. Virginia*, 377 U. S. 158 (1964); *Berger v. New York*, *supra*.

Not for 17 years, until this day, has this Court applied *Olmstead* to sanction a Fourth Amendment violation

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<sup>5</sup> If the evidence introduced in *Desist* had been obtained by telephone wiretap, I assume the majority would have to agree that it could not be used at trial. This is a federal case, and as early as 1937 this Court held that evidence obtained in violation of § 605 of the Federal Communications Act, 48 Stat. 1103, 47 U. S. C. § 605, may not be received in evidence in a federal court. *Nardone v. United States*, 302 U. S. 379. The fact that a telephone wiretap would not be admissible in the circumstances of this case further elucidates the whimsicality of the present decision. As a result of the chance sequence of decisions, the Court gives less scope to the Federal Government's violation of constitutional mandate than the Court would permit in the case of disregard of a statutory command.



because of *Olmstead's* peculiar distinction.<sup>6</sup> Statements by the Department of Justice in recent years have placed no reliance upon *Olmstead's* quaint constriction of the individual's area of privacy.<sup>7</sup> The Omnibus Crime Control and Safe Streets Act of 1968, recently enacted by Congress, does not recognize *Olmstead's* long-outmoded distinction between permissible and nonpermissible invasions of privacy. That statute requires judicial authorization for wiretaps and electronic surveillance, whether or not they would involve a physical trespass. Pub. L. 90-351, 82 Stat. 211-225. The New York statute involved in *Kaiser* purports to require warrants for eavesdropping, but it makes no such absurd distinction as *Olmstead* describes. N. Y. Code Crim. Proc. § 813-a. Only those police officials and courts whose devotion to wiretapping and electronic surveillance is so intense as to induce them to exploit those techniques until the last spade of earth is shoveled on the doc-

<sup>6</sup> The Court did apply the *Olmstead* doctrine in *On Lee v. United States*, 343 U. S. 747 (1952). See also *Goldman v. United States*, 316 U. S. 129 (1942).

<sup>7</sup> See, e. g., Hearing before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 86th Cong., 1st Sess., pt. 4, 1034-1035, 1036 (1959); Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., 372-373 (1961); Hearings before the Senate Committee on the Judiciary, 87th Cong., 2d Sess., 11-46 (1962); Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 3, 1154-1165 (1965); Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., 33-35 (1966); Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 90th Cong., 1st Sess., pt. 1, 48-58 (1967); H. Brownell, The Public Security and Wiretapping, 39 Cornell L. Q. 1163 (1954); W. Rogers, The Case for Wiretapping, 63 Yale L. J. 792 (1954).

trinal corpse have continued to rely on *Olmstead*. It is not the least of the unfortunate consequences of today's decisions that they validate this kind of foot-dragging. They reward those who fought the battle for uncontrolled police eavesdropping to the bitter end, despite the clear, though undelivered, verdict. They add this Court's approval to those who honor the Constitution's mandate only where acceptable to them or compelled by the precise and inescapable specifics of a decision of this Court. And they award dunce caps to those law enforcement officers, courts, and public officials who do not merely stand by until an inevitable decree issues from this Court, specifically articulating that which is clearly imminent in the fulfillment of the Constitution, but who generously apply the mandates of the Constitution as the developing case law elucidates them.

The full realization of our great charter of liberty, set forth in our Constitution, cannot be achieved by this Court alone. History does not embrace the years needed for us to hold, millimeter by millimeter, that such and such a penetration of individual rights is an infringement of the Constitution's guarantees. The vitality of our Constitution depends upon conceptual faithfulness and not merely decisional obedience. Certainly, this Court should not encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach.

The best evidence of the moribund state of *Olmstead* at the time *Katz* was decided is the Court's opinion in *Katz* itself. That opinion acknowledged and relied upon the fact that *Olmstead* had long ceased to have vitality. In *Katz*, the Court said:

"It is true that the absence of [physical] penetration was at one time thought to foreclose further Fourth Amendment inquiry, *Olmstead v. United*

*States*, 277 U. S. 438, 457, 464, 466; *Goldman v. United States*, 316 U. S. 129, 134-136, for that Amendment was thought to limit only searches and seizures of tangible property. But '[t]he premise that property interests control the right of the Government to search and seize has been discredited.' *Warden v. Hayden*, 387 U. S. 294, 304. Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law.' *Silverman v. United States*, 365 U. S. 505, 511. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

"We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. . . ." 389 U. S., at 352-353.

Since *Katz* itself recognized that *Olmstead* had been "eroded by our subsequent decisions" and that we had "since departed from the narrow view on which [it] . . . rested," how can the Court now say that because *Katz* overruled *Olmstead* it "was a clear break with the past"? The issue presented by *Desist* and *Kaiser* is not whether the petitioners will be given the benefit of *Katz*. The

issue is *not* whether *Katz* is "retroactive." The issue is whether *because* in *Katz* we formally announced that the "reach of [the Fourth Amendment] . . . cannot turn upon the presence or absence of a physical intrusion into any given enclosure," persons claiming the benefit of this principle prior to that date must be denied its protection. It is, I submit, entirely appropriate to state the issue in these terms, because there can be no doubt whatever that if the present cases had been presented to this Court a day, a year, or a number of years before *Katz*, we would have held that the petitioners' constitutional rights had been violated, and that the petitioners were entitled, like any other citizens, to their constitutional rights. In these circumstances, I utterly fail to see how today's decisions can be justified. It is indeed a paradox that *Katz*, whose role it was to bury the corpse of *Olmstead*, is here being used to revive it.